117-519

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 184.

THE NEW YORK LIFE INSURANCE COMPANY, PLAINTIFF IN ERROR,

vs.

THOMAS C. FLETCHER, EXECUTOR OF CHINONDA S. ALFORD, DECEASED.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

FILED JANUARY 13, 1883.

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1 The United States of America to Thomas C. Fletcher, executor of Chinonda S. Alford, deceased, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the New York Life Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Samuel Treat, judge of the said court of the United States for the eastern district of Missouri, this second day of November, in the year of our Lord one thousand eight hundred and eighty-two.

SAMUEL TREAT,
Judge United States District Court, Eastern District of Missouri.

1½ Service of the within citation acknowledged, this 2d day of November, 1882, at St. Louis, Mo.

THOMAS C. FLETCHER,
As Executor,
By GEO. D. REYNOLDS,
His Att'y of Record.

[Endorsed:] No. 1908. United States circuit court, eastern district of Missouri. Thos. C. Fletcher, executrix, &c., *vs.* New York Life Insurance Company. Citation. Filed Nov. 2, 1882. M. M. Price, clerk.

2 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1882, thereof, between Thomas C. Fletcher, executor of Chinonda S. Alford, deceased, plaintiff, and the New York Life Insurance Company, defendant, a manifest error hath happened, to the great damage of the said defendant, The New York Life Insurance Company, as by its complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held,

that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this second day of November, in the year of our Lord one thousand eight hundred and eighty-two.

Issued at office, in the city of St. Louis, with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk Circuit Court United States, Eastern District of Missouri,
By A. P. SELBY, *Deputy.*

Allowed by—

SAMUEL TREAT, *Judge.*

2½ *Return to Writ.*

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the record and proceedings in the within-entitled case, with all things concerning the same.

In witness whereof I hereto subscribe my name and affix the seal of said circuit court, at office in the city of St. Louis, this 14th day of November, A. D. 1882.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *D. C.*

[Endorsed:] No. 1908. United States circuit court, eastern district of Missouri. Thomas C. Fletcher, executor, *vs.* New York Life Ins. Co. Writ of error to the circuit court of the U. S., eastern district of Missouri. Returned and filed ——— day of ———, 188 . ———, clerk.

3 UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States in and for said District.

Be it remembered that on the fifth day of September, A. D. 1881, the following among other proceedings were had and appear of record in said court, to wit:

Transcript Filed and Appearance Entered.

THOMAS C. FLETCHER, Executor, &c., Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } 1908.

Now comes the defendant, by Messrs. Overall and Judson, its attorneys, and files transcript from the St. Louis circuit court and enters appearance.

Said transcript is in words and figures following, to wit:

Transcript.

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

Be it remembered that heretofore, to wit, on the 21st day
4 of April, 1881, there was filed in the office of the clerk of the circuit court, city of St. Louis, a petition wherein Thomas C. Fletcher, executor of the last will and testament of Chenonda S. Alford, deceased, plaintiff, and New York Life Insurance Company, defendant, which petition is in the words and figures as follows, to wit:

Petition.

STATE OF MISSOURI, *City of St. Louis:*

In the Circuit Court, City of St. Louis. June Term, 1881.

THOMAS C. FLETCHER, Executor of the last will and testament of Chenonda S. Alford, deceased, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Plaintiff states that he is the executor of the last will and testament of Chenona S. Alford, late of the city of St. Louis, deceased, duly authorized by letters testamentary granted to him by the probate court of St. Louis to execute the will of the deceased and
5 to collect his estate. That the defendant is a corporation created and existing under the laws of the State of New York, and doing business as a life insurance company in the State of Missouri.

Plaintiff further states that the defendant, by its policy of insurance dated the twenty-second day of December, eighteen hundred and seventy-seven, herewith filed, contracted and agreed to and with said Chenonda S. Alford, for the consideration of two hundred and sixty-three dollars and eighty cents to said defendant in hand paid, and of the annual premium of two hundred and sixty-three dollars and eighty cents, to be paid in like manner on the twenty-second day of December of each and every year during the continuance of said policy, did insure the life of said Chenonda S. Alford in the amount of ten thousand dollars for the term of his natural life, commencing on said twenty-second day of December, eighteen hundred and seventy-seven, at noon; and the said defendant, by the said policy, did promise and agree to and with said Alford to pay the amount

6 of the said insurance, at its office in the city of New York, to the legal representative of said Alford, in sixty days after due notice and satisfactory proof of the death of the said assured; that said defendant, by its president and actuary, signed and delivered said contract on the said twenty-second day of December, eighteen hundred and seventy-seven: that the said Chenonda S. Alford thereafter paid to defendant the full amount of the premium so agreed to, paid as aforesaid, for each and every year thereafter, and in every respects kept and performed each and every undertaking on his part; that on or about the twenty-fourth of September, eighteen hundred and eighty, the said Chenonda S. Alford died, at St. Louis aforesaid; that plaintiff gave to defendant due notice and satisfactory proof of the death of said Alford, and demanded of defendant the amount of said insurance; that more than sixty days has elapsed since said notice of death was given to defendant and since said proof
7 and demand were made; that defendant has neglected and refused to pay said sum of ten thousand dollars, the insurance aforesaid, and still does neglect and refuse to pay the same: Wherefore the plaintiff says an action hath accrued to him as such executor to have and recover from said defendant the aforesaid sum of ten thousand dollars, and for which sum of ten thousand dollars he asks judgment.

JAMES BAKER,
Attorney for Plaintiff.

And on the same day a summons issued, directed to the sheriff of the city of St. Louis, which summons, togeth- with the sheriff's return thereon, is in words and figures as follows, to wit:

Summons.

CITY OF ST. LOUIS, } ss:
State of Missouri, }

To the sheriff of the city of St. Louis, Greeting:

We command you to summon — New York Life Insurance Company to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of St. Louis
8 on the first Monday of June next, then and there to answer the complaint of Thomas C. Fletcher, executor of the last will and testament of Chenonda S. Alford, deceased, as set forth in the annexed petition, and have you then and there this writ.

Witness Charles F. Vogel, clerk of our said court, with the seal thereof hereto affixed, at office in the city of St. Louis, this 21st day of April, in the year of our Lord eighteen hundred and eighty-one.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

Sheriff's Return.

Executed this writ in the city of St. Louis, this 22nd day of April, 1881, by delivering a copy of the writ and petition as fu-nished by the clerk to Wm. L. Hill, who is the person authorized by law to accept service of writs for the New York Life Insurance Company,

defendant herein, in the State of Missouri, as per appointment on file with the insurance commissioner of the State of Missouri.

ISAAC M. MASON, *Sheriff*,
Per JOHN F. MIELET, *Dep'y*.

9 And afterwards, on the 13th day of June, 1881, the following answer was filed, to wit:

Answer.

THOMAS C. FLETCHER, Executor, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now comes defendant, answering plaintiff's petition, admits that it is a corporation organized under the laws of New York; admits that *that* plaintiff is executor of Chenonda S. Alford, as alleged; admits the execution of the policy sued on, but denies all the allegations of the petition not herein and hereinafter expressly admitted, and says that plaintiff is not entitled to recover on said policy, for that—

First. The policy described in petition was issued by defendant, at its office in the city of New York, under the laws of the State of New York, in consideration, among other things, of the written application made by Chenonda S. Alford, and signed by him, and of each of the statements and answers made therein, and that
10 by the express terms of said policy said application was made part of the contract therein and thereby entered into between said Alford and this defendant; that said statements and answers, and each of them, were therein and thereby admitted to be material and warranted to be full and true, and to be the only statements upon which the contract evidenced by said policy was made, and that a copy of said application, so signed by said Chenonda S. Alford, and constituting the basis of said contract of insurance, was attached to and made part of said policy when issued by this defendant; that said application contained the following question, numbered eleven: Has the party (meaning said Alford) had or been afflicted, since childhood, with any of "the following complaints," mentioning, among others, the following: "Diseases of the liver, kidneys, or brain?" and to each of said complaints so enumerated said Alford answered "No." Defendant states that such answer was false and untrue; that said Alford had, prior to said application, been afflicted with a disease of the kidneys, one of said com-
11 plaints named, to wit, diabetes; that said application also contained the following question, numbered twenty-seven: "Name and residence of person's (meaning said Alford's) usual medical attendant, on what occasion and for what disease, have you required his attendance and advise;" to which question said Alford answered: "Has none," meaning by said answer that he, said Alford, had no usual medical attendant. Defendant states that answer was false and untrue, and that said Alford had, at and prior to said application, a usual medical attendant, and that he had required

his attendance and advice on sundry occasions, and for serious diseases and disorders. Defendant states that the foregoing statements and answers were by said Alford, plaintiff's testator in said application, warranted to be true, and in express terms agreed by him to be the basis of the contract of insurance evidenced by the policy; and defendant avers that, by reason of the falsity of the said statements and answers so warranted to be true, the said con-
12 tract, and the policy thereunder issued, are void and of no effect against this defendant.

Second. And, further answering, defendant says that the policy described in petition was issued by defendant at its office in the city of New York, in consideration, among other things, of the written application made by Chenonda S. Alford, plaintiff's testator therefor, and signed by him, and of each of the statements and answers made therein, and that by the express terms of said policy said application was made part of the contract therein and thereby entered into between said Alford and this defendant; that a copy of said application, so signed by Chenonda S. Alford, and constituting the basis of said contract of insurance, was attached to and made part of said policy when issued by this defendant. That said application contained the following question numbered eleven: "Has the party (meaning said Alford) had or been afflicted since childhood with any of the following complaints;" mentioning among others
13 the following "diseases of the liver, kidneys, or brain;" and to each of said complaints so enumerated said Alford answered "No." Defendant states that such answer was false and untrue; that said Alford had, prior to said application, been afflicted with a disease of the kidneys, (to wit, diabetes,) one of said complaints named. Defendant states that said answer was material to the risk thus undertaken under said contract and policy by this defendant. That the disease thus not disclosed, but concealed, actually contributed to the contingency or event upon which said policy was payable; and that said Alford thereafter died of said disease; and that defendant entered into said contract and issued said policy on the faith of, and relying upon, the truthfulness of said answer; and that had it known the truth thus not disclosed, and concealed, it would not have entered into said contract or issued said policy.

Third. That said application also contained the following question, numbered twenty-seven: "Name and residence of per-
14 son's (meaning said Alford's) usual medical attendant; on what occasions and for what diseases have you required his attendance and advice." To which question said Alford answered "has none," meaning by said answer that he, said Alford, had no usual medical attendant. Defendant states that answer was false and untrue, and that said Alford had, at and prior to said application, a usual medical attendant; and that he had required his attendance and advice on sundry occasions and for serious diseases and disorders. Defendant states that said false statement contained in said answer was material to the risk thus undertaken under said contract and policy by this defendant; that by reason thereof the fact that he, said Alford, had theretofore been afflicted with aforesaid

disease, was concealed, and the defendant was deprived of the means of ascertaining his true physical condition before issuing said policy; that defendant entered into said contract and issued said policy on the faith of, and relying upon, the truthfulness of said answer; and that had it known the truth thus not disclosed, but concealed, it would not have entered into said contract or issued said policy. Wherefore defendant asks to be hence dismissed with its costs.

By its attorneys:

OVERALL AND JUDSON.

And at the June term, 1881, of said court, the following proceedings were had in said cause, to wit:

THURSDAY, *June 16th*, 1881.

THOMAS C. FLETCHER, Executor of the Last Will and Testament of Chenonda S. Alford, deceased,
vs.
NEW YORK LIFE INSURANCE COMPANY. } 56077.

Now at this day comes said defendant by its attorneys and files herein a petition for the removal of this cause to the United States circuit court for the eastern district of Missouri, and submits the same to the court, and it is thereupon ordered that upon said defendant giving bond, conditioned according to law, in the sum of five hundred dollars, with approved security, the clerk of this court do certify to the circuit court of the United States for the eastern district of Missouri a full, true, and complete transcript of the record and proceedings in this cause. Bond approved by the court and filed.

Which petition and bond are respectively in words and figures as follows, to wit:

Petition for Removal.

In St. Louis Circuit Court. June Term, 1881.

STATE OF MISSOURI, } ss:
City of St. Louis, }

THOMAS C. FLETCHER, Executor of C. S. Alford, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

The petition of the above-named defendant, the New York Life Insurance Company, respectfully represents to this honorable court that your petitioner was at the time of the commencement of this suit, and still is, a corporation organized under the laws of State of New York, and a citizen of said State, and that plaintiff was then, and still is, a citizen of State of Missouri; that the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars. Your petitioner makes and files herewith a bond, with good and sufficient securities, for its entering in the circuit court of the United States for the eastern district of Missouri,

on the first day of its next session, a copy of the record in this suit, and for paying all costs that may be awarded by the said circuit court if said court shall hold that this suit has been wrongfully or improperly removed thereto.

Your petitioner therefore prays this honorable court to accept his petition and bond and order the removal of said cause to said circuit court of the United States for the eastern district of Missouri.

By its attorneys:

OVERALL AND JUDSON.

STATE OF MISSOURI, } ss:
City of St. Louis, }

Frederick N. Judson, being duly sworn, upon oath says: That he is the attorney of the petitioner named above and knows that
18 the statements of said petition are true, and that he has had personal charge, in behalf of petitioner, of the said cause.

FREDERICK N. JUDSON.

Subscribed and sworn to before me, this 14th day of June, A. D. 1881, commission expires February 17th, 1882.

[SEAL.] SAM'L M. SUTT,
Notary Public, City of St. Louis, Missouri.

Bond for Removal.

Know all men by these presents that the New York Life Insurance Company, as principal, and F. N. Judson and J. H. Overall, as sureties, are held and firmly bound unto Thomas C. Fletcher, executor of C. S. Alford, in the penal sum of five hundred dollars, the payment whereof, well and truly to be made unto the the said T. C. Fletcher, executor, and assigns, we bind ourselves, and representatives, jointly and severally, firmly by these presents. Yet upon these conditions the said New York Life Insurance Company having petitioned the circuit court of city of St. Louis, State of Missouri, for the removal of a certain cause therein pending, wherein
19 said T. C. Fletcher, executor, is plaintiff, and the New York Life Insurance Company is defendant, to the circuit court of the United States for the eastern district of Missouri:

Now, if the said New York Life Insurance Company, your petitioner, shall enter in the said circuit court of the United States, on the first day of its next session, a copy of the record in said suit, and shall well and truly pay all costs that may be awarded by said circuit court of the United States, if said court shall hold that said suit was wrongfully or improperly removed thereto, then the obligation to be void; otherwise, in full force and virtue.

Witness our hands and seals, this — day of June, A. D. 1881.

NEW YORK LIFE INSURANCE CO., [SEAL.]
By F. N. JUDSON. [SEAL.]
F. N. JUDSON. [SEAL.]
JOHN H. OVERALL. [SEAL.]

Approved in open court, June 16th, 1881.

Attest. CHARLES F. VOGEL, *Clerk.*

STATE OF MISSOURI, *City of St. Louis:*

I, Charles F. Vogel, clerk of the circuit court, city of St.
20 Louis, do hereby certify the above and foregoing to be a true, full, and complete transcript of the record and proceedings had in the above-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof, I hereunto set my hand and affix the seal of said court at office, in the city of St. Louis, this 7th day of July, 1881.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

21 And afterwards, to wit, on the 27th day of September, A. D. 1881, the following amended petition was filed in said cause, in the circuit court of the United States for the eastern district of Mo.; which amended petition is in words and figures following, to wit:

Amended Petition.

In the Circuit Court. September Term, 1881.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

THOMAS C. FLETCHER, as Executor of Chinonda S. Alford, deceased, Plaintiff,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

The plaintiff, Thomas C. Fletcher, for amended petition, filed herein by leave of court, states that the New York Life Insurance Company at the time when this suit was instituted, and at the times and dates hereinafter stated, was a corporation created and organized under the laws of the State of New York and a citizen thereof, and that it then was and now is engaged in transacting the
22 business of life insurance in the State of Missouri, under the rights and subject to the liabilities conferred and imposed upon it by force and virtue of the laws of the State of Missouri, having in this State agents for the transaction of its business and having obtained from the insurance department of this State license and authority to transact in this State the business of effecting insurance upon lives of individuals.

That by virtue of said license and under the laws of the State of Missouri said defendant was prosecuting its said business in this State on or about the 18th day of December, 1877, and in the prosecution of said business, at the city of St. Louis, in this State, by its agent or agents, said defendant solicited one Chinonda S. Alford, then a citizen of said State and resident at St. Louis, to effect insurance upon his life by taking out an insurance policy in said defendant company.

That on or about the date last aforesaid, at the said city of St. Louis, said Alford made an application for insurance in said
23 company defendant at the solicitation of an agent of defend-

ant, on a printed blank filled up by said agent, and afterwards, to wit, on or about December 26th, 1877, at said city of St. Louis, Missouri, received from said agent a policy of insurance, dated December 22nd, 1877, duly executed by the officers of said defendant, by the terms whereof said defendant promised and agreed, in consideration of the observance of certain conditions in said policy set out, and of the payment of the sum of $263\frac{80}{100}$ dollars upon the delivery of the policy and the further payment of a like sum on the 22nd day of December of each year thereafter during the continuance of said policy, to pay to the legal representatives of said Chinonda S. Alford the sum of ten thousand (10,000) dollars at its office in the city of New York in 60 days after due notice and satisfactory proof [of] the death of said Alford during the continuance of the said policy of the said Alford, deducting therefrom all indebtedness to the defendant, together with any balance of the year's premium remaining unpaid.

Said policy has been heretofore filed in this cause.

That upon receipt by him of said policy said Alford paid to defendant, at said city of St. Louis, Missouri, said sum of $263\frac{83}{100}$ dollars; that he has at all times observed and faithfully kept and performed the conditions of said policy, and has regularly and faithfully paid the annual premiums thereon as they severally became due, all of said payments having been made to agents of said defendant, at the said city of St. Louis, upon the production by them of receipts signed by the proper officers of the defendant, whereby defendant, on the death of said Alford, became liable to pay to his legal representatives the said sum of ten thousand dollars.

That at the city of St. Louis, in the State of Missouri, that being his place of residence, the said insured Chinonda S. Alford, on or about the 24th day of September, 1880, died, said policy being then in full force and continuance.

That afterwards and before the institution of this suit the probate court of the city of St. Louis, Missouri, duly issued to plaintiff letters testamentary upon the estate of said Alford, by virtue whereof he became the legal representative of said Alford; that he duly qualified as such executor, and from thence forward has been acting as such.

That on or about October, 1880, this plaintiff, as such executor and legal representative of said Alford, gave to defendant due notice and satisfactory proof of the death, during the continuance of said policy, of said Alford; and at the office of said defendant in the city of New York, as well as at its chief agency in this city, demanded of the defendant the payment of said sum of ten thousand dollars (there being no indebtedness nor any unpaid portion of any annual premium to deduct).

That although 60 days has long since elapsed from the day when said notice and proofs were given, and demand of payment has since been frequently made, defendant has not paid said sum nor any part thereof, but has vexatiously refused to pay said loss.

Wherefore plaintiff demands judgment for ten thousand (10,000)

dollars, the amount of said policy, and for ten (10) per centum on the amount thereof as provided by statute in such cases, and for interest from October 25th, 1880, as well as for costs.

CARR & REYNOLDS,
Att'ys for Plaintiff.

27 And afterwards, to wit, on the 23d day of September, A. D. 1882, an amended answer to said amended petition was filed in said cause, which said amended answer to amended petition is as follows:

Amended Answer to Amended Petition.

UNITED STATES OF AMERICA, }
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States for the Eastern District of Missouri.

THOMAS C. FLETCHER, Executor of Chenonda S. Alford, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant. } No. 1908.

Now comes defendant and, by leave of court, filing its amended answer to plaintiff's amended petition herein, admits that it is a corporation organized under the laws of New York; admits that plaintiff is executor of Chenonda S. Alford; admits the execution of the policy sued on, but denies all the allegations of said
28 amended petition not herein and hereinafter expressly admitted, and says that plaintiff is not entitled to recover on said policy, for that—

First. The policy described in petition was executed by defendant's officers, to wit, its president and actuary, at its home office, in the city of New York, in the State of New York, on the 22nd day of December, 1877, under the laws of said State, in evidence of and embodying the terms of the contract of insurance then and there, at said home office, entered into by defendant with said Alford, in acceptance and upon the faith of the written application therefor, theretofore made and signed by said Alford, and submitted by him to said home office of the company, in city of New York, for consideration and acceptance or rejection, at said home office; that said application, and each of the statements and answers therein contained, so submitted to defendant at its home office, and there accepted, by the express terms of said policy became and were part of the contract therein and thereby entered into between said
29 Alford and this defendant, and said contract, by the terms of said policy, was to be performed at said home office, in city of New York; that said application, so made a part of said contract, contained the following express agreement of said Alford, in words as follows, to wit:

"And I do hereby agree that the statements and representations contained in the forgoing application and declaration shall be the

basis of the contract between me and the said company, the truthfulness of which statements and representations I do hereby warrant, and that if the same, or any of them, are in any respect untrue the policy, which may be issued thereon, shall be void, and all money which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements
30 and representations referred to, it is expressly understood and agreed that no statements, representations, or information, made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company, at the home office, in the above application."

That a copy of said application, on the faith of which said contract was entered into, as aforesaid, was attached to said policy when executed by the officers of defendant; and said policy, with said copy of the application attached, was thereupon delivered to said Alford, on the payment of the first premium, as therein provided.

That said application contained the following question, numbered eleven: "Has the party (meaning said Alford) had or been afflicted, since childhood, with any of the following complaints," mentioning, among others, the following: "Diseases of the liver, kidneys,
31 or brain?" and to each of said complaints so enumerated said Alford answered "No."

Defendant avers that said answer was false and untrue; that said Alford had, prior to said application, since childhood been afflicted with a disease known as a disease of the kidneys, to wit, "diabetes."

That said question numbered eleven also contained the following: "Or any serious disease?" To which said Alford also answered, "No," meaning thereby that he was not, nor had he at any time since childhood been afflicted with any serious disease.

Defendant avers that said answer was false and untrue, and that said Alford had, since childhood, prior to said application, been afflicted with a serious disease, to wit, "diabetes."

That said application also contained the following question, numbered thirteen: "Has the party (meaning said Alford) ever been seriously ill; if so, what was the complaint and who was the medical attendant; state his name and residence?" To which
32 said Alford answered, "No," meaning thereby that he had never been seriously ill.

Defendant avers that said answer was false and untrue; that said Alford had, prior to said time, been seriously ill with a dangerous complaint known as "diabetes," and had a medical attendant for treatment of same.

That said application also contained the following question, numbered twenty-seven: "Name and residence of person's (meaning said Alford) usual medical attendant; on what occasion and for

what diseases have you required his attention and advice?" To which question said Alford answered, "Has none," meaning by said answer that he, said Alford, had no usual medical attendant.

Defendant states that such answer was false and untrue, and that said Alford had, at and prior to said application, a usual medical attendant, to wit, one V. L. Brokaw, and that he had required his attendance and advice on sundry occasions, and for serious diseases and disorders.

Defendant states that the foregoing statements and answers
33 were by said Alford, plaintiff's testator, in said application, warranted to be true, and in express terms agreed by him to be the basis of the contract of insurance evidenced by the policy, and defendant avers that, by reason of the falsity of the statements and answers, so warranted to be true, the said contract and the policy thereunder issued are void and of no effect against this defendant.

Second. And, further answering, defendant says that the policy described in the amended petition was issued by defendant at its office in the city of New York in consideration, among other things, of the written application made by Chenonda S. Alford, plaintiff's testator, therefor and signed by him, and of each of the statements and answers made therein, and that by the express terms of said policy said application was made part of the contract therein, and thereby entered into between said Alford and this defendant; that a copy of said application so signed by said Chenonda S. Alford, and constituting the basis of said contract of insurance, was attached to and made part of said policy when issued by this
34 defendant.

That said application contained the following question, numbered eleven: "Has the party (meaning said Alford) had or been afflicted since childhood with any of the following complaints?" mentioning, among others, the following: "diseases of the liver, kidneys, or brain," and also the following, "or any serious disease;" and to each of said interrogatories, and to each of said complaints so enumerated, said Alford answered "No." Defendant states that said answers were each false and untrue; that said Alford had, since childhood, and prior to said application, been afflicted with a serious disease, known as a disease of the kidneys, to wit, "diabetes."

That said application also contained the following question, numbered thirteen: "Has the party (meaning said Alford) ever been seriously ill? If so, with what complaint, and who was the medical attendant? (State his name and residence.)" To which said interrogation said Alford answered "No," meaning thereby that he had never been seriously ill.

35 Defendant avers that said answer was false and untrue; that said Alford had, prior to said time, been seriously ill with a dangerous complaint known as "diabetes," and that he had had a medical attendant for treatment of the same.

Defendant avers that said answers were material to the risk thus undertaken under said contract and policy by this defendant; that the disease, thus not disclosed, but concealed, actually contributed to the contingency or event upon which said policy was payable,

and that said Alford thereafter died of said disease, "diabetes," and that defendant entered into said contract and issued said policy on the faith of, and relying upon the truthfulness of, said answers, and that had it known the truth, thus not disclosed, but concealed, it would not have entered into said contract or issued said policy

Third. That said application also contained the following question, numbered twenty-seven: "Name and residence of per-
36 son's (meaning said Alford) usual medical attendant; on what occasions and for what diseases have you required his attendance and advice?" To which question said Alford answered "Has none," meaning by said answer that he, said Alford, had no usual medical attendant.

Defendant states that said answer was false and untrue and that said Alford had, at and prior to said application, a usual medical attendance, to wit, one Doctor V. L. Brokaw, and that he (said Alford) had required and received his attendance and advice on sundry occasions and for serious diseases and disorders, and for a serious disease known as "diabetes," and that he (said Alford) thereafter died of said disease for which he had received such attendance and advice.

Defendant avers that said false statement contained in said answer was material to the risk thus undertaken under said contract; that by reason thereof the fact that he, said Alford, had theretofore been afflicted with the aforesaid disease, "diabetes," was con-
37 cealed and the defendant was deprived of the means of ascertaining the true physical condition of said Alford before issuing said policy; that defendant entered into said contract and issued said policy on the faith of, and relying upon the truthfulness of, said answer, and that had it known the truth, thus not disclosed, but concealed, it would not have entered into said contract or issue said policy.

Wherefore defendant asks to be hence dismissed, with its costs.

By its attorneys:

OVERALL & JUDSON.

38 And afterwards, to wit, on the 23rd day of September, A. D. 1882, the following reply to said amended answer was filed in said cause in words and figures following, to wit:

Reply to Amended Answer.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court, September Term, 1882.

THOMAS C. FLETCHER, as Executor of Chinonda S. Alford, deceased, Plaintiff,

vs.

THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now again comes the plaintiff and for reply to the new matter in the amended answer of the said defendant state the following, which

he avers to be the facts in regard to the whole transaction connected with the alleged application as referred to by said answer:

In December, 1877, the said defendant, a life insurance company, incorporated by the State of New York & under its laws, was
39 engaged in transacting its business in this State, had a general agent in the city of St. Louis, and various solicitors and agents in said city & State; was authorized & licensed under the laws of the State of Missouri to transact business in this State & make contracts of insurance and collect premiums and solicit risks therein. In said month of December, 1877, two of the agents of said defendant, namely, Anthony Roesline and Louis ———, who were personally acquainted with said Alford, and aware of his past and present physical condition, came to said Alford on several different occasions, at his office in said city of St. Louis, and as agents of the defendant, solicited him to take out a policy of insurance in said company. That on each & all of these soliciting visits said Alford told both & each of said agents of the defendant that he did not believe he, said Alford, was insurable; that they knew he had been in bad health, and knew he had undergone medical treatment for diabetes; that he thought he was now well & free from the disease, but
40 that the fact of his having had it would, he thought, cause the defendant to contest liability on any policy it might issue to him, and he would be throwing his money away; said agents of defendant assured him that he, Alford, was insurable; that the fact that he had had the disease made no difference; and that if he would take out a policy and pay the premiums as required therein he would have no trouble whatever. Finally, about the 18th December, 1877, the said Roesline & ———, as agents of defendant, came to said Alford, at his office in the city of St. Louis, Missouri, and renewing their intreaties as aforesaid, and being reminded by said Alford of the conversations aforesaid, prevailed on him to consent to take out a policy in their company. To that end they then told him it would be necessary to have him answer certain questions as a matter of form. Thereupon one of said agents proceeded to read out to said Alford questions in a printed blank they had with them, which plaintiff supposes is the application referred to in said
41 amended answer; and as said Alford answered such questions, one of said agents pretended to take down and write in said blank in substance the answer given by him to each question, and to fill in the answers to said questions in such manner & with such matter as he, said agent, saw fit; not reading over what he had written to said Alford, nor consulting him as to what he had written, nor informing him, Alford, of the effect of what he had written, but assuring said Alford that the whole thing was a mere formality.

When said agents of defendant came to the questions referred to by defendant in its answer as numbers 11 and 27, and to the general question as to said Alford's medical history, said Alford said to said agents: "You know all about my condition; you know I was sick and was under treatment by Dr. Brokaw for diabetes, and if you want to find out anything more about me, there is Dr. Brokaw's office," (pointing to a window exactly across the street from

42 said Alford's office, and pointing to said Brokaw's office sign) "and there is his sign; he has been my physician for years, knows all about me, and you can go right over there and ask him every thing you want to know."

That said Alford having thus truthfully and fully answered said questions, the said agents of defendant, without the knowledge of said Alford, wrote the answer to question No. 11, "No," and the answer to question No. 27, "Has none," well knowing that the same were not the true answers given by said Alford; that said Alford did not know how the said answers were taken down, & had no reason to believe that they were taken down falsely; that after said Alford had fully & truly answered all questions asked of him, he was asked by said agents of defendant to sign his name to the blank to identify him as the party to whose use and benefit the policy was to issue, and that for that purpose he signed his name twice to said paper without reading it over, without reading the answers inserted

43 in it by defendant's said agent, and without any knowledge that the said agents of defendant had inserted answers to said questions other than the ones he gave; that at the same time said agents had said Alford examined by the medical examiner of the company, who was there present; that said agents did not read over to the said Alford any other parts of said application except the questions; did not read over to him the particular clause set out by the defendant's amended answer, nor in any way call his attention to the fact that his signatures were intended as an acceptance or assent to the said clause.

And plaintiff says that the answers given to questions 11 and 27 are not the answers of said Alford to said questions, but are the answers and statements of the agents of the defendant. Further replying, this plaintiff denies that the said Alford made, filled up, or signed the application set out by defendant, or that he made the answers and statements contained in it.

44 And he denies that the copy or what purports to be a copy of an application made by him is a true copy of any application made by him.

After said paper was signed by said Alford, as aforesaid, the said agents of defendant took it, and what disposition they made of it is unknown to plaintiff, but he avers that said Alford neither sent it to any officers of defendant at New York, or authorized any one to do so. A short time afterwards one of the said agents of defendant, Roesline, as this plaintiff believes, came to said Alford at his office in the city of St. Louis, Missouri, delivered him the policy sued on, & took from said Alford his premium, so called for in said policy; that said Alford, supposing the answers in the application were taken as given or were written to the satisfaction of defendant, did not read over the copy attached; did not read over the policy; but was told by said agent, on delivering it, that it was all right & he was insured, and said Alford paid no further attention to the matter.

45 That afterwards said Alford paid to said agent of defend-

ant, Roesline, the annual premiums as they fell due, and that said Roesline, as agent of defendant, with full knowledge that the answers as written on said application were not the true answers given by said Alford to said questions, accepted, demanded, & received from said Alford the said annual premiums, and informed said Alford that his insurance was safe; and that said agent did this as agent and with full knowledge of all the facts. Plaintiff says that by the acts of the defendant as aforesaid in the premises, the said defendant is estopped from now pretending that any of the answers as written render said policy void.

Plaintiff further denies that the answer- of said Alford were, as written to the said questions, *were* false in so far as relates to his having had any disease of the kidneys, for he denies that he had at any time disease of the kidneys, nor is it true that, when said application was made, said Alford had disease of the kidneys nor any other serious disorder; nor is it true that he then had, or
46 prior thereto had had, any disease which contributed to, or was the immediate cause of his death, or that he died of any disease of the kidneys, or of any disease which he before then had.

And plaintiff denies that said Alford made any misrepresentations in securing said policy, which in any manner actually contributed to the contingency & event on which the policy became due; and he avers that even if the answers as given by him had been correctly written down, and all the facts set out in the application, yet, notwithstanding that, the defendant would have insured him, and would have considered him a good risk; nor is it true that the fact that he had before been treated for diabetes, & had had that disease, & had had a regular physician, in any manner or degree contribute to the contingency or event on which the policy became due; and he avers that said Alford in December, 1877, had been & was, for a long time prior thereto, entirely free & cured of said disease; that he had no traces whatever of it in his system, and that
47 the disease, of which he died, attacked him long after he took out said policy, and within about three months of his death.

Finally, pl'ff denies each & every other allegations in said amended answer, & demands judgment.

JAMES CARR & GEO. D. REYNOLDS,
Att'ys for Plaintiff.

48 And afterwards, to wit, on said 23d day of September, A. D. 1882, the following demurrer to said reply was filed in said cause, in words and figures following, to wit:

Demurrer to Reply.

UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

In the Circuit Court of the United States for the Eastern District of Missouri.

THOMAS C. FLETCHER, Executor of C. S. Alford, Plaintiff, }
vs. } No. 1908.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant. }

I. Now comes defendant and demurs to all that part of the reply of plaintiff to the amended answer of defendant from the beginning thereof down through the 17th line of page 6 of said reply, concluding with the words "and are the answers and statements of the agents of the defendant," and for cause of demurrer states—

49 First. That the matters therein set forth as pleaded do not constitute a cause of action against this defendant, nor constitute in law any reply to the new matter set forth in defendant's amended answer.

Second. That any issuable facts in said portion of said reply contained are intermixed with statements of evidence and matters wholly irrelevant.

Wherefore defendant prays the judgment of the court that said part of said reply be adjudged insufficient in law.

II. And defendant demurs to all that part of the reply of plaintiff to the amended answer of defendant, commencing with the words "after said paper was signed," in the 27th line of the 6th page of said reply, and concluding with the words "render said policy void," in the 13th line of the 8th page of said reply, and for cause of demurrer states—

First. That the matters therein set forth do not in law constitute any cause of action in plaintiff, nor any defence to the mat-

50 ters set forth and pleaded in defendant's said amended answer.

Second. That said part of said reply contains statements of evidence and matters wholly irrelevant.

Wherefore defendant prays the judgment of the court that said part of said reply be adjudged insufficient in law.

By its attorneys: OVERALL & JUDSON.

51 And afterwards, to wit, on the 28th day of September, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

Demurrer to Reply Overruled.

THOS. C. FLETCHER, Exe'r, &c., Plaintiff, }
vs. } 1908.
NEW YORK LIFE INSURANCE COMPANY, Defendant. }

Now come the parties, by their attorneys, and the court having

considered the demurrer of defendant to the plaintiff's replication, finds the law thereon for the plaintiff, and orders that said demurrer to replication be, and the same is hereby, overruled.

And afterwards, to wit, on the 6th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

THOMAS C. FLETCHER, Executor of Chinonda S. Alford, deceased, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } 1908.

52 Now come the parties, by their attorneys, the plaintiff by Messrs. Carr and Reynolds, and the defendant by Messrs. Overall and Judson; and this case being regularly called for trial, and both parties being ready, it is ordered that a jury come; and thereupon come said jury, to wit, Samuel Bailey, W. C. Lindsay, Aaron L. Grigsby, J. H. Taylor, John B. Beale, James B. Roberts, Bearnard Fenerstein, Peter Hawn, John R. Turner, Samuel Ross, Shannon Reid, and E. L. Patterson, twelve good and lawful men, duly empanel-ed and sworn to well and truly try the issues joined herein; and thereupon the evidence was heard in part, but not being concluded at the hour of adjournment it is ordered that further proceedings herein be continued until to-morrow morning.

And afterwards, to wit, on the 7th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

THOS. C. FLETCHER, Executor of Chinonda S. Alford, deceased, Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } 1908.

53 And now again come the parties, by their attorneys, the plaintiff by Messrs. Carr and Reynolds, and the defendant by Messrs. Overall and Judson; and also come the jury herein as on yesterday, to wit, Samuel Bailey, W. C. Lindsay, Aaron L. Grigsby, J. H. Taylor, John B. Beale, James B. Roberts, Bernard Fernerstein, Peter Hawn, John R. Turner, Sam'el Ross, Shannon Reid, and E. L. Patterson, who, after hearing the evidence and arguments of counsel, and receiving the charge of the court, return the following verdict:

"We, the jury, find for the plaintiff in sum of ten thousand dollars, with interest at the rate of six per cent. per annum from the 14th day of February, 1881.

"JAMES B. ROBERTS."

It is therefore considered by the court that the plaintiff, Thomas C. Fletcher, executor of Chinonda S. Alford, deceased, have and recover of the defendant, the New York Life Insurance Company, as

well as the sum of ten thousand nine hundred and eighty-eight dollars and thirty-three cents, the damages and interest thereon aforesaid by the jury assessed, as also the costs herein expended, and have thereof execution.

54 And afterwards, to wit, on the 27th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

THOMAS C. FLETCHER, Executor, &c., Plaintiff,
vs.
NEW YORK LIFE INSURANCE COMPANY, Defendant. } 1908.

Now comes the defendant, by attorney, on whose motion it is ordered that the time to file supersedeas bond herein be extended to November 1st.

And afterwards, to wit, on the 30th day of October, A. D. 1882, the following further proceedings were had and appear of record in said cause, to wit:

THOMAS C. FLETCHER, Executor, &c., Plaintiff,
vs.
NEW YORK LIFE INSURANCE CO., Defendant. } 1908.

Now comes the defendant, by its attorney, and presents to the court its bill of exceptions herein, signed by his honor, Judge McCrary, who presided at the trial of said cause; and thereupon, on motion of said attorney, it is ordered that said bill of exceptions be filed *nunc pro tunc* as of October 28, 1882, and made part of the record herein.

Which said bill of exceptions *are* in the words and figures as follows, to wit:

55 *Bill of Exceptions.*

THOMAS C. FLETCHER, as Exec. of Chinonda S. Alford, Plaintiff,
vs.
NEW YORK LIFE INS. COMPANY, Defendant.

In the United States Circuit Court for the Eastern District of Missouri.

Be it remembered that in above cause, on the 23d day of September, 1882, the following proceedings were had:

Defendant filed its demurrer to certain parts of reply filed by plaintiff to defendant's amended answer to the amended petition herein, which said demurrer is in words and figures following, to wit:

Demurrer.

UNITED STATES OF AMERICA, *Eastern District of Missouri,* } ss:

In the Circuit Court of the United States for the Eastern District of Missouri.

THOMAS C. FLETCHER, Executor of C. S. Alford, Plaintiff, *vs.* THE NEW YORK LIFE INSURANCE COMPANY, Defendant. } No. 1908.

56 I. Now comes defendant and demurs to all that part of the reply of plaintiff to the amended answer of defendant from the beginning thereof down through the 17th line of page 6 of said reply, concluding with the words "and are the answers and statements of the agents of the defendant," and for cause of demurrer states—

First. That the matters therein set forth as pleaded do not constitute a cause of action against this defendant, nor constitute in law any reply to the new matter set forth in defendant's amended answer.

Second. That any issuable facts in said portion of said reply contained are intermixed with statements of evidence and matters wholly irrelevant, wherefore defendant prays the judgment of the court that said part of said reply be adjudged insufficient in law.

II. And defendant demurs to all that part of the reply of plaintiff to the amended answer of defendant commencing with
57 the words "after said paper was signed," in the 27th line of the 6th page of said reply, and concluding with the words "render said policy void," in the 13th line of the 8th page of said reply, and for cause of demurrer states—

First. That the matters therein set forth do not in law constitute any cause of action in plaintiff, nor any defence to the matters set forth and pleaded in defendant's said amended answer.

Second. That said part of said reply contains statements of evidence and matters wholly irrelevant.

Wherefore defendants pray the judgment of the court that said part of said reply be adjudged insufficient in law.

By its attorneys:

OVERALL & JUDSON.

Which demurrer was by the court overruled.

On the hearing on said demurrer the following opinion was rendered, to wit:

58 *Opinion of Hon. Samuel Treat, Judge.*

THOS. C. FLETCHER, Executor, *vs.* THE NEW YORK LIFE INS. CO.

Demurrer to Replication.

There are substantially only two questions involved:

First. Inasmuch as the policy sued on declared that it rests on the

basis of answers made to the application, and that said policy was to be issued at the home office in New York on return thereto of the application, can the plaintiff avail himself of the force of the Missouri statute?

The defendant company was doing business in Missouri with the privileges granted to it here, when said insurance was effected. It may be that the formal acceptance of the proposed contract was, by the letter of the contract, to be consummated in New York. The broad proposition, however, remains; no artifice to avoid which can be upheld. The statutes of Missouri, for salutary reasons, permit foreign corporations to do business in the State on prescribed conditions. If, despite of such conditions, they can by the insertion of clause in their policy withdraw themselves from the limitations of the Missouri statutes, while obtaining all the advantages of its license, then a foreign corporation can by special contract upset the statutes of the State and become exempt from the positive requirements of law. Such a proposition is not to be countenanced. The defendant corporation chose to embark in business in this State under the terms and conditions named in the statute. It could not by paper contrivances, however specious, withdraw itself from the operation of the laws by the force of which it could alone do business within the State. To hold otherwise would be subsersive of the right of the State to decide on what terms, by comity, a foreign corporation should be admitted to do business or be recognized therefor within the State jurisdiction. Each State can decide for itself whether a foreign corporation shall be recognized by it and on what terms. Primarily, a corporation has no existence beyond the territorial limits of the State creating it, and when it undertakes business beyond, it does so only by comity. The defendant corporation having been permitted to do business in Missouri, under the statutes of of the latter, was bound by all the provisions of those statutes, and could not by the insertion of any of the many clauses in its forms of application, &c., withdraw itself from the obligatory force of the statute. The contract of insurance, therefore, is a Missouri contract and subject to the local law.

There are other questions involved in the demurrer which are of no small importance. It is averred that the answers to questions in the application were not only false, but as to matters which were so far essential to the risk as to fall within the terms of the statute; in other words, that the insured died of the very disease which he denied or concealed. If that be so, there can be no recovery.

On the other hand it is alleged that he made the fullest and most honest disclosures with respect thereto and referred the soliciting agent to his physician for a fuller statement; that the soliciting agent, in his anxiety to secure the policy, and being acquainted with the applicant, wrote down as answers to the questions objected to—not what the applicant answered, but what he, the agent, chose to fill out, so as not to lose the risk. This involves the proposition whether, when under the terms of the policy the application is declared to be the sole basis thereof, any evidence will be heard to avoid its effect against the party's own signature.

This question is not a new one; of course a fraud will bind no one. Why, then, should a signature to an application of this kind procured by fraud be obligatory? It is not a question of estoppel, for an insurance company may have continued to receive premiums in ignorance of the false statement by the applicant, and therefore should not be held to a fraudulent contract of whose fraudulent character it knew nothing.

59 The real question presented is whether the averments in the reply are sufficient to overcome the defence set up. We hold that if the statements of the reply are true then the defence is overcome. If the disease mentioned was fatal the plaintiff, even under the Missouri statute, is driven to show that the answers to the application which he signed were, despite his signature, never made by him; in other words, that a fraud was perpetrated on him by the company's agent.

Analyzing the pleadings, there is room for comment as to the form thereof. The doctrine is clear that only probative or ultimate facts can be pleaded and not mere matters of evidence. The reason is obvious. What issue shall be taken? Not on details of evidence tending to show a fact, but solely as to the existence of the probative fact itself.

With due regard to the rules of pleading, it appears that, despite surplusage, the replications must be held good, in the light of the legal rules stated, inasmuch as there can be no pleadings subsequent to the reply.

Demurrer overruled. McCrary, J., concurs.

CARR & REYNOLDS,
For Plaintiff.
OVERALL & JUDSON,
For Defendant.

[Endorsed:] 1908. U. S. C't C't, E. D. Mo. Thos. C. Fletcher, Ex'c, *vs.* N. Y. Life Ins. Co. Copy of Judge Treat's opinion.

60 And to said ruling of the court in overruling said demurrer defendant duly excepted at the time,

And thereafter, on Friday, October 6, 1882, the above-entitled cause came on for hearing before his honor, Judge McCrary, and a jury, when the following proceedings were had, Geo. D. Reynolds, Esq., for plaintiff, and Messrs. John H. Overall & F. N. Judson, for defendant.

The plaintiff, to sustain the issues on his part, offered in evidence as follows:

Deposition of Charles E. King.

CHARLES E. KING, sworn for the plaintiff, testified as follows:

Direct examination by Mr. REYNOLDS.

Q. What is your business?

A. I am chief clerk of the insurance department of the State of Missouri, and have been such for about twelve years.

It is admitted that the defendant is licensed under the laws of the State of Missouri, as a foreign life insurance company, to do business in this State, and has complied with the provisions of the State law in regard to such companies.

61 Q. Such licenses to foreign companies to do business in this State are issued on the applications of the companies, are they not?

A. Yes, sir.

Q. And before such license is issued it is necessary for a company to apply for a license to do business?

A. Yes, sir.

No cross-examination.

Deposition of T. C. Fletcher.

THOMAS C. FLETCHER, sworn for the plaintiff, testified as follows:

Direct examination by Mr. REYNOLDS.

Q. You are the plaintiff in this case as the executor of Chinonda S. Alford, are you not?

A. Yes, sir.

Q. When did Mr. Alford die?

A. I think about the 24th of September, 1880. He died at his residence, No. 3333 Pine street, St. Louis, Missouri.

Q. What business had he been engaged in?

A. He had been a dealer in lumber.

It is admitted that the witness is the executor of Chinonda S. Alford, deceased.

Q. How long had Mr. Alford lived in this city?

62 A. I think he came here somewhere about 1865 or 1866.

Q. Where was he living on December 22, 1877?

A. In St. Louis.

Q. Where was he living on December 18, 1877?

A. In St. Louis.

Q. He has lived in St. Louis, then, ever since 1866?

A. I think he lived here from about 1866 up to the time of his death.

Q. In your examination of the papers of the estate when you took charge of it, did you find any receipts in regard to this policy in suit?

A. I did; and I found the insurance policy in suit issued to him by the New York Life Insurance Company.

Q. Is this the policy to which you refer (handing the policy in suit to the witness)?

A. Yes, sir.

It is admitted that the premiums on the policy in suit were paid.

Q. Are these the receipts that you found (handing receipts to the witness)?

A. Yes, sir; they are for the payment of the premiums on the

policy in suit. On the delivery of the policy there was paid
63 $264.80; on December 22, 1868, $263.80; and on December 22, 1879, $263.80. These are the receipts given by the agent of the Insurance Company for those amounts.

Plaintiff's counsel offered in evidence the receipts just identified by the witness.

Which said receipts are in words and figures as follows, to wit:

ST. LOUIS, *Feb'y* 1, '78.

Mr. C. S. Alford to A. Roeslin, Dr.

January 14, '78. To pre'm p'd to N. Y. Life Ins. Co.---- $264 80
Rec'd payment.

ANTHONY ROESLIN.

NEW YORK LIFE INSURANCE COMPANY,
346 & 348 BROADWAY.

Notice to policy-holders: If the premium is not paid on or before the day it becomes due, under the terms and conditions of the policy, which are hereby referred to, the risk is no longer binding upon the company. Agents are not authorized to make, alter, or discharge contracts or waive forfeitures. Payments of premiums to agents are not valid unless receipts be given signed by the president, vice-president, or actuary. When receipts are sent to agents for
64 delivery such agents must countersign the same as evidence of payment to them. All premiums are due and payable at the office in New York. For the convenience of the assured they may be paid to an agent, but only upon the production of the receipt above specified.

No. 129,833. $263.80. NEW YORK, *Dec.* 22, 1878.

Received two hundred & sixty-three & $\frac{80}{100}$ dollars in full for annual premium due on above date, on policy numbered as above, on life of C. S. Alford.

WM. H. BEERS,
Vice-President and Actuary.

WM. L. HILL, *Gen'l Agent.*

[Endorsed across the face in red ink:] Not valid unless countersigned by W. L. Hill, general agent.

NEW YORK LIFE INSURANCE COMPANY,
346 & 348 BROADWAY.

Notice to policy-holders: If the premium is not paid on or before the day it becomes due, under the terms and conditions of the policy, which are hereby referred to, the risk is no longer binding upon the the company. Agents are not authorized to make, alter, or discharge contracts or waive forfeitures. Payments of premiums to agents are not valid unless receipts be given signed by the
65 president, vice-president, or actuary. When receipts are sent to agents for delivery such agents must countersign the same

as evidence of payment to them. All premiums are due and payable at the office in New York. For the convenience of the assured they may be paid to an agent, but only upon the production of the receipt above specified.

No. 129,833. $263.80. NEW YORK, *Dec.* 22, 1879.

Received two hundred & sixty-three $\frac{80}{100}$ dollars in full for annual premium due on above date, on policy numbered as above, on life of C. S. Alford.

WM. H. BEERS,
Vice-President and Actuary.

WM. L. HILL, *Gen'l Agent.*

[Endorsed across the face in red ink:] Not valid unless countersigned by W. L. Hill, general agent.

Q. Do you know who Mr. W. L. Hill is?

A. I have met Mr. Hill; he is the agent of the New York Life Insurance Company in this city; I think he is the principal agent.

Q. Did you file proofs of loss under this policy with Mr. Hill; if so, when?

A. I did. I prepared the necessary proofs of death in the manner required by the Insurance Company, and upon blanks which, I believe, they furnished me for that purpose.

Q. When did you file them?

66 A. I made the proof, I think, December 14, 1880; that is my recollection of it.

Q. Did the company pay you?

A. No, sir; they declined to pay the amount of the policy; I had a talk with Mr. Hill, I believe, and some other gentlemen, who represented the company, in regard to it on one occasion, and I think they had the proofs there.

It is admitted that the defendant company received the proofs of loss referred to.

The WITNESS: The proofs had been — to New York and were returned here to the agents; there was no objection made to the proof of the death.

Q. They disputed the liability on another point?

A. Yes, sir.

Plaintiff's counsel offers in evidence the policy sued on.

Which said policy is in words and figures following, to wit:

Policy of Insurance.

(Attach this to your policy.)

To policy-holders of the New York Life Insurance Co.:

67 To insure certain and prompt replies to any communication to this company do not fail to give your particular address, residence, county and State; and when writing about a policy always give the number, name, and date of payment. These precau-

tions are necessary, as there are many parties of the same name insured, and there are often two places of the same name.

Notify the company of any change in address.

Number 129,833. Amount, $10,000.

The New York Life Insurance Company,

Annual premium, $263.80.

Payable Dec. 22d.

By this policy of insurance, in consideration of the statements and representations submitted to its officers at the home office, in the city of New York, and contained in the written application for this policy and in the declaration thereto subjoined (all of which statements and representations have been and are hereby warranted by the applicant to be true, and are by the parties hereto referred to and made a part of this contract), upon the faith of which statements and representations this

68 policy is issued, and of the sum of two hundred & sixty-three dollars and eighty cents, to them in hand paid, and of the annual premium of two hundred & sixty-three dollars and eighty cents, to be paid in like manner and sums, as per margin, in every year during the continuance of this policy, doth insure the life of Chinonda S. Alford, merchant of St. Louis, in the State of Missouri, in the amount of ten thousand dollars, for the term of his natural life, commencing on the twenty-second day of December, 1877, at noon.

And the said company doth hereby promise and agree to pay the amount of the said insurance, at its office in the city of New York, to the assured under this policy, to wit:

Age, 35. Chinonda S. Alford's legal representatives, in sixty days after due notice and satisfactory proof of the death, during the continuance of this policy, of the said person whose life is hereby insured as above, deducting therefrom all indebtedness to the company, together with any balance of the year's premium remainign unpaid.

69 This policy is issued and accepted by the assured upon the following express conditions and agreements:

1st. If the person whose life is hereby insured shall travel or reside beyond the settled limits or protection of the Government of the United States (excepting in the settled limits of the Dominion of Canada, Prince Edward's Island, or Newfoundland), or between the first of July and the first of November south of a line beginning at the point of intersection of the northerly boundary of North Carolina with the Atlantic coast; thence running westerly along the said northerly boundary to a point one hundred miles from the coast; thence in a southwesterly direction, continuing one hundred miles from said coast to the thirty-fourth parallel of latitude; thence westerly along said parallel to the westerly border of Alabama (excepting the city of Atlanta and an area within a radius of fifty miles around it); thence northerly along the westerly border of Alabama and along the Tennessee river to the northerly boundary of Tennessee; thence westerly along the northerly boundary

of Tennessee and Arkansas, extended to the ninety-seventh degree of west longitude; thence southerly to the thirty-second parallel of north latitude; thence westerly along the said parallel to the Pacific Ocean; or shall enter upon a voyage upon the high seas (except as hereinafter specified); or shall be personally engaged in blasting, mining, submarine operations, or the production of highly inflammable or explosive substances, or in working or managing a steam engine in any capacity, or as mariner, engineer, fireman, conductor, express messenger, or laborer, in any capacity, upon service on any sea, sound, inlet, river, lake, or railroad; or shall enter any military or naval service whatsoever (the militia when not in actual service excepted), without the consent of this company in each or either of the foregoing cases, previously given in writing; or if he shall die in, or in consequence of, a duel, or of the violation of the laws of any nation, State, or province; or if his death shall be caused by the use of intoxicating drink or opium; or if any of the statements or representations hereinabove in the first paragraph of this policy referred to shall be found in any respect untrue, then and in every such case this policy shall be null and void.

2d. If the premiums as above stipulated shall not be paid on or before the days above mentioned for the payment thereof, at the office of this company in the city of New York (unless otherwise expressly agreed in writing), or to agents, when they produce receipts signed by the president, vice-president, or actuary, then and in every such case this company shall not be liable for the payment of the sum assured, or any part thereof, and this policy shall cease and determine (claim for paid-up policy, as hereinafter provided for, excepted); and the acceptance in any case by the company of a premium on a day subsequent to the day whereon the same is payable as above specified shall be deemed an act of courtesy only, and shall not be deemed a waiver of the foregoing conditions as to payment of premiums accruing thereafter, or as establishing any use or custom in conflict therewith. While the said company or its agents may, at their option, give notice of the time of payment of said premiums, the giving of such notice shall be deemed an act of courtesy only, and shall not be deemed to establish a custom in relation thereto, or to be obligatory upon said company or its agents.

3d. In every case where this policy shall cease and determine or become or be null and void, all payments thereon shall be forfeited to this company, and no action or right of action shall remain to or be maintained against this company by the assured or by any other person by virtue of this policy, or of anything connected therewith.

4th. Receipts for premiums are not valid, unless signed by the president, vice-president, or actuary.

5th. Agents of the company are not authorized to make, alter, or discharge contracts or waive forfeitures.

6th. Inasmuch as only the officers at the home office of the company, in the city of New York, have authority to determine whether or not a policy shall issue on any application, and as they act on

the written statements and representations herein above re-
73 ferred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking the application for this policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company at the home office in the application referred to.

7th. The person whose life is hereby insured has permission to pass as passenger by direct route in first-class vessels as follows: 1st, to and from Europe (travel and residence wherein is hereby permitted); 2d, to and from California, and along the coasts of Nova Scotia, New Brunswick, and the United States, between Cape Canso and the Rio Grande (provided no port is entered in which residence at the time of such entrance is prohibited); 3rd, between ports on the east Pacific coast north of 32° of north latitude; 4th, between ports on the east Pacific coast north of 32° of north latitude, and ports in the Sandwich Islands, China, and Japan.

74 If, after premiums upon this policy for not less than three complete years shall have been duly received by the company, this policy shall cease and determine in consequence of default in payment of a subsequent premium, the company will, on due surrender of this policy and the dividends thereon, issue in lieu thereof (provided such surrender be made within three months of the date of such default, but not otherwise) a paid-up policy (payable as above) for an amount to be determined by the company, according to the method then in use by it in determining the paid-up value of its policies of this class: Provided, however, That in case the said paid-up value shall not amount to one hundred dollars, the company reserves the right to pay a cash surrender value to be fixed by the company in lieu of issuing the paid-up policy. An assignment of this policy, to be valid, must be made in duplicate; both must be sent to the company for acknowledgement, and due proof of interest produced with the proofs of death.

In witness whereof the said New York Life Insurance Company has, by its president and actuary, signed and delivered this
75 twenty-second day of December, one thousand eight hundred and seventy-seven.

HENRY NAUHLIN, *President.*
WM. H. BEERS,
Vice-Pres. & Actuary.

[On side:] Examined: W. M. A. General policy. Ordinary life.

Application to the New York Life Insurance Company.

Office, Nos. 346 & 348 Broadway, New York.

Particulars required from persons proposing to effect insurance on lives in this company and forming the basis of the contract.

———, No. of Policy. St. Louis, Mo., (post-office address.)

1. Name (in full) of the party whose life is proposed to be insured.
Chinonda S. Alford.

2. Present residence.
St. Louis, in the county of St. Louis, in the State of Mo.
3. Profession or occupation; state precise nature of business.
Lumber merchant.
4. Place and date of birth.
Jefferson county, Missouri; year, 1842; month, Nov.; day, 16.
5. Age next birthday. 36.
Age nearest age nearest birthday. 35.

NOTE.—See that these ages and date of birth agree.

6. Is said party married or single?
Married.
76 7 A. Are the habits of said party at the present time, and have they always been, sober and temperate?
A. Yes.
B. Does the party use intoxicating drinks habitually as a beverage?
B. Yes; very moderately.
C. Is the person engaged in any way in the retailing of alcoholic liquors?
C. No.
8. Has the party had yellow fever; if so, when, where, and who was the medical attendant?
No.
9. Has the party been successfully vaccinated?
Yes.
10. Is the party subject or predisposed to dyspepsia, dysentery, diarrhœa, or any other disease or bodily infirmity?
No.
11. Has the party had, or been afflicted since childhood, with any of the following complaints?

Separate answer required to each query.

Diseases of the lungs or pulmonary complaint. No.
Spitting or raising of blood. No.
Rupture. No.
Fits or convulsions. No.
Insanity. No.
Rheumatism. No.
Dropsy. No.
Bronchitis. No.
Fistula. No.
Bilious colic. No.
Paralysis. No.
77 Apoplexy. No.
General debility. No.
Spinal disease. No.
Gout. No.
Cancer. No.
Small-pox. No.
Scrofula No.

Eruptions or disease of the skin. No.
Syphilis. No.
Asthma. No.
Palpitation or disease of the heart. No.
Disease of the liver, kidneys, or brain. No.
Or any serious disease. No.

12. Has the party ever met with any accidental or serious personal injury?

No.

13. Has the party ever been seriously ill; if so, when, with what complaint, and who was the medical attendant? (State his name and residence.)

No.

14. Is the said party now in good health?

Yes.

15. Has either of the parents or any brother or sister of said party died of or been afflicted with consumption, scrofula, insanity, gout, or any pulmonary complaint, or any hereditary disease? (State particulars.)

No.

78 16 A. Are the party's parents living? If so, what are their ages?

A. Father's age if living, —. Mother's age, if living, 76.

B. If dead, at what ages and of what diseases did they die?

B. Father's age at death, 50. Cause of death, cholera. Mother's age at death, —. Cause of death, —.

N. B.—In giving "cause of death," avoid all indefinite terms, such as "fever," "general debility," "exposure," etc. If the word "childbirth" be used, specify how long after delivery the death occurred, and whether it was accompanied by any disease of the chest.

17. How many brothers and sisters has the party had?

3 brothers, 2 sisters.

18. How many are living, and what are their ages?

1 brother's age, 34; 1 sister's ages, 53, about.

19. How many of them are dead, and at what ages and of what diseases did they die?

Brothers dead, 2; ages, —. Causes of death: 1, infancy; 2, infancy; 3; 4. Sisters dead, 1; ages, —. Causes of death: 1, infancy; 2; 3; 4.

79 20. What is the present and general of health of parties referred to in queries 16 and 18.

Good.

21. Is the party now insured in this company, or has he ever been, and, if so, state numbers of policies and amount?

No.

22. Has the party any other insurance on his life? If so, where and for what amounts?

No.

23. Has any proposal to insure the life of said party ever been declined? If so, by what company?

No.

24. Has any proposal or application to insure the life of said party ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.

No.

25. Has any physician given an unfavorable opinion upon the life of said party, with reference to life insurance? If so, state particulars.

No.

26. Where has the party resided (during summer and winter) during the last ten years?

St. Louis.

27. Name and residence of person's usual medical attendant? On what occasions and for what diseases have you required his attendance and advice?

Has none.

If the applicant has required the services of a physician during the last seven years, or for serious illness before that period, this certificate must be procured, or the issuing of the policy may be delayed.

28. Have you consulted any other medical man? If so, for what, and when?

No.

29. Name and residence of an intimate friend?

80 Richard Hospes, St. Louis.

The policy will not be issued until this certificate is furnished to the company.

30. Sum to be insured. $10,000.

Premium, how payable. Annually.

On what table. Ordinary life.

31. Name (in full), residence, and occupation of the party in whose favor the insurance is proposed, and relationship, if any, to the party whose life is proposed to be insured?

Himself.

32. Do you desire a policy issued on the "Tontine Investment Policy" plan? If so, specify whether you select the ten-year, fifteen-year, or twenty-year tontine period.

I select the — year tontine period.

NOTE.—Insert number of years in writing.

33. Has the "Tontine Investment Policy" plan, referred to in question 32, been fully explained to you, and do you authorize the company to retain the dividends on the policy hereby applied for, and to place the same in a reserve fund in which you are to participate in accordance with the provisions made by the company regarding policies in the class you have selected, and not otherwise?

NOTE.—This question is to be answered whenever a policy
81 is desired on the "Tontine Investment Policy" plan, and not otherwise.

34. Does the party wish a policy in the "southern class" of this company, with permission to travel and reside, at all seasons of

the year, in any Southern State, it being understood and agreed that in the making of dividends upon policies of this class regard shall be had to the mortality actually experience- in said class compared with the mortality of the rest of the assured?

NOTE.—This question is to be answered in the affirmative only by those who reside permanently south of a line beginning at the point of intersection of the northerly boundary of North Carolina with the Atlantic coast; thence running westerly along the said northerly boundary to a point one hundred miles from the coast; thence in a southwesterly direction, continuing one hundred miles from said coast to the thirty-fourth parallel of latitude; thence westerly along said parallel to the westerly border of Alabama (excepting the city of Atlanta and an area within a radius of fifty miles around it); thence northerly along the westerly border of Alabama
82 and along the Tennessee river to the northerly boundary of Tennessee; thence westerly along the northern boundary of Tennessee and Arkansas extended to the ninety-seventh degree of west longitude; thence southerly to the thirty-second parallel of north latitude; thence westerly along the said parallel to the Pacific Ocean.

35. Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the party's health, will vitiate the policy and forfeit all payments made thereon?

Yes.

I do hereby declare that the person above named whose life is proposed for insurance is now in good health, and does ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health or habits of life of said person with which the trustees of the New York Life Insurance Company ought to be made acquainted (and that I have an interest in the life of the said person to the full amount of the sum hereby applied for).
83 And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company; the truthfulness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue, the policy which may be issued hereon shall be void, and all moneys which may have been paid on account of such insurance shall be forfeited to said company; and inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or
84 information be reduced to writing and presented to the officers of the company, at the home office, in the above applica-

tion. I further agree that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by an authorized agent of the company during the lifetime and good health of the party whose life is proposed to be insured; and that the whole or any part of the risk herein proposed may be reinsured.

Dated at St. Louis, Mo., this 18th day of December, 1877.

*Signature of the person or persons for whose benefit the insurance is to be effected. (Write the name in full.)

CHINONDA S. ALFORD.

Witness: LOUIS LEYDBURG.
Agent: ANTHONY ROESTEIM.
Ed. 6–1–77.

Signature of the person whose life is proposed for insurance. (Write the name in full.)

CHINONDA S. ALFORD.

85 And endorsed on the back of said policy are the words and figures following, to wit: No. 107. June term, 1881. 56077. No. 129,833. New York Life Insurance Company. Assurance on the life of ———. Filed April 21, 1881. Chas. F. Vogel, clerk. Chinonda S. Alford. Amount, $10,000. For the information of the assured, and in order that any unintentional errors or omissions which hereafter may be found to exist may be corrected, an abstract of the application upon which this policy is based may be found on third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president or actuary. W. L. Hill, agent. 1908. Filed Sept. 5, 1881. M. M. Price, c'lk.

86 Cross-examination by Mr. JUDSON, counsel for defendant:

Q. Is this the proof of loss (handing a paper to the witness)?
A. Yes, sir; that is the paper.

This was all the evidence introduced by the plaintiff in chief.

Defense.

The defendant, to sustain the issues on its part, offered evidence as follows:

Defendant's counsel offers in evidence the proofs of loss filed with the defendant company on behalf of the deceased.

Which said proof of death is in the words and figures following, to wit:

Proof of Death.

No. 1. Claimant's Statement.

Notice is hereby given to The New York Life Insurance Company

*Note.—In case of husband and wife, or parent and children, the former may sign for the latter thus: Mary Smith, by John Smith.

that Chinonda S. Alford has died; that deceased was the same person whose life was assured by said company under policy No. 129,833, dated Dec. 22, 1877, for the sum of ten thousand dollars;
87 that all premiums due prior to the time of decease had been duly paid upon said policy; that said deceased did not violate any of the conditions of said policy either in respect to residence, occupation, or otherwise; that the undersigned is the legal owner of said policy; and has a good and valid interest to the amount assured in the life of said deceased, and in proof of claim under said policy doth answer as follows:

1. Name of deceased.
Chinonda S. Alford.
2. Residence.
3333 Pine St., [St.] Louis city, Mo.
3. Occupation at date of assurance.
Lumber dealer.
4. Occupation since assurance was effected.
Lumber dealer.
5. Place and date of birth.
Born in Jefferson Co., Mo., at Herculaneum, Nov. 16th, 1841.
6. Place and date of death.
Died in St. Louis city, Mo., Sept. 24th, 1880.
7. Name and residence of all physicians who have attended the deceased during the last two years.
Dr. F. L. Brockaw—Dr. Bryson in consultation.
8. How long have you known deceased?
Known him for about 34 years.
88 9. If insured in any other companies, give name of companies and amounts in each?
In the Pen Mutual Life Insurance Co.; amount, $5,000.00.
10. Is the assurance claimed under assignment?
No.
11. If so, by whom was the policy assigned?
No assignment.
12. Was the assignment made for a good and valuable consideration?
No assignment.

Dated at St. Louis, this sixth day of December, 1880.

THO. C. FLETCHER, *Executor.*

STATE OF MISSOURI, *City of St. Louis:*

On the sixth day of December, 1880, personally appeared before me the above-named Thos. C. Fletcher, to me k-own, and made oath that the foregoing statements by him made are true and full to the best of his knowledge, recollection, and belief.

[SEAL.] GUSTAVE V. R. MECHEM,
Notary Public.

No. 2.—*Attending Physician's Statement.*

1. Name of deceased.
C. S. Alford.
2. Occupation.
Lumber merchant.
89 3. Residence.
3333 Pine St., St. Louis, Mo.
4. How long had you been acquainted with the deceased?
More than ten years.
5. Were you his attending physician before his last sickness? If so, for what disease, and when?
Yes; *I* almost 10 years; I think I treated him for dysentery.
6. Has deceased had any other medical attendant to your knowledge? If so, give name and particulars of illness.
No; not to my knowledge, except Dr. Bryson in consultation.
7. Was the deceased afflicted with any chronic diseases? If so, how long?
Yes, diabetes, 5 or 6 years ago.
8. Were you his attending physician during his last sickness and up to the time of his death?
Yes.
9. Date of first visit.
Sept. 2nd, 1880.
10. Date of last visit.
Sept. 24, 1880.
11. Date of death.
Sept. 24, 1880.
12. State the disease of which the deceased died, and any important medical facts connected therewith?
Diabetes. I first treated him for this disease about 6 years
90 ago. He apparently entirely recovered an- had no sym-toms of the disease for period of 3 or 4 years. Drank occasion-ly, but I do not think he was intemperate.
14. Was there any special cause (remote or proximate) for the death, in the habits, occupation, residence, or personal or family history, of the deceased?
No.
15. Have you stated all the material facts relating to the sickness of the deceased?
Yes.
16. State real or apparent age of the deceased.
I should think between 35 & 40.

Dated at St. Louis, this 7 day of Dec., 1880.

F. V. L. BROKAW,
Attending Physician.

Note.—The doctor made this the 6th by error. G. V. R. M.

STATE OF MISSOURI, *City of St. Louis:*

On this seventh day of December, 1880, before me came the above-

named F. V. L. Brokaw, known to me as a physician in regular standing, and made oath that the answers by him given to the foregoing questions are true and full, to the best of his knowledge and belief.

[SEAL.] GUSTAVE V. R. MECHIN.

91 *No. 3.—Statement of the Minister or other party who officiated at the interment of Deceased.*

STATE OF MISSOURI, } *ss:*
City of St. Louis, }

James H. Brooks, of Saint Louis, being duly sworn, deposes and says that he is the minister of the Washington Avenue Presby'r. Church, at St. Louis, and that he was personally acquainted with C. S. Alford, 3333 Pine St. of Saint Louis, in his lifetime, now deceased, and that said deceased was interred in the burial ground of Bellefountaine Cemetery on the 26th day of September, A. D. 1880, and that he officiated at such interment.

JAMES H. BROOKS.

Subscribed and sworn before me, this 13th day of December, A. D. 1880.

GUSTAVE V. R. MECHIN, [SEAL.]
Notary Public.

No. 4.—Statement of the Undertaker.

1. Name of deceased.
Chinonda S. Alford.
2. Residence.
3333 Pine St., St. Louis city, Mo.
3. Occupation.
Lumber merchant.
4. Did you inter the body of said deceased, and do you know that it was the body of the person described in the accompanying statement of the claimant in this case?

92 I did. I do.

5. Give general description of body of deceased, specifying particularly height.
Slim man at death, about 5 feet 10 in height.
6. Date of birth.
Do not know.
7. Age at death.
About 38 years.
8. Cause of death.
Do not recollect.
9. Place and date of death.
Died at 3333 Pine St., St. Louis city, Mo., Sept. 24, 1880.
10. Place of and date of interment.
Bellefontain Cemetery, St. Louis city, Mo., Sept. 26, 1880.

Dated at St. Louis city, this sixth day of December, 1880.

J. P. SMITHERS,
Undertaker.

STATE OF MISSOURI, *City of St. Louis:*

On this 6th day of December, 1880, personally appeared before me, the above-named J. P. Smithers, to me known, and made oath that the foregoing statements by him made are true and full, to the best of his knowledge, recollection, and belief.

[SEAL.] GUSTAVE V. R. MECHIM,
A Notary Public.

93 No. 5.—*Statement of a Friend.*

1. Name of deceased?
Chinonda S. Alford.
2. How long have you known deceased?
About 6 years.
3. Place and date of death.
Died at 3333 Pine St., [St.] Louis city, Mo., on Sept. 24th, 1880.
4. Age of deceased at death.
I think, 38 years & 10 months.
5. Have you seen the remains of — body of the person deceased, and is —, to your knowledge, the same person described in the before-named policy of insurance?
Yes.
6. State all the facts within your knowledge relating to the cause of death.
He was taken sick in the beginning of summer & went North to improve his health, but failed; was taken worse & had to go home about Sept. 8th & 9th, & failed very fast. I dis-olved partnership with him Sept. 15th.
7. Was the deceased in the habit of using spiritous liquors; if so, did it affect his health?
I think he drank nothing but wine within the last 18 months & before that other drink occasionally. I do not think it affected his health in any way.

94 8. Are there any circumstances within your knowledge, information, or belief, or have any facts come to your knowledge inconsistent with the statements hereto attached, made by the claimant and attending physician in this case? If so, state them fully.
I know none.
9. Has the deceased, to your knowledge, violated any of the conditions of said policy of insurance?
Not to my knowledge.
Dated at St. Louis city, Mo., this sixth day of December, 1880.

ERASTUS H. WARNER,
1607 Ashdown St.

STATE OF MISSOURI, *City of St. Louis:*

On this sixth day of December, 1880, personally appeared before me the above named Erastus H. Warner, to me known, and made oath that the foregoing statements by him made are true and full, to the best of his knowledge, recollection, and belief.

[SEAL.] GUSTAVE V. R. MECHIM,
Notary Public.

95 STATE OF MISSOURI, *City of St. Louis:*

I, Charles F. Vogel, clerk of the circuit court, city of St. Louis, the same being a court of record, certify that Gustave V. R. Mechin, whose name is subscribed to the certificates of proof of acknowledgement of the annexed instrument, dated December 6, 7, & 13, 1880, was on said dates an acting notary public in and for said city, duly commissioned and qualified, and authorized to take the same; that I am acquainted with his handwriting, and verily believe that the signatures thereto are genuine, and that to all such — his official acts full faith and credit are and ought to be given. I further certify that said instrument is executed and acknowledged according to the laws of this State.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office in the city of St. Louis, this 13th day of December, eighteen hundred and eighty.

[SEAL.] CHAS. F. VOGEL, *Clerk.*

96 NOTE.—Certificate of county clerk must in all cases be obtained that the person administering the oath was duly authorized for that purpose.

When the beneficiary under a policy is dead (as in the case of a policy in favor of the person whose life is assured), a certificate will be required from the proper court to show who is authorized to act as administrator or executor of such deceased beneficiary.

When a policy has been assigned the original assignment, or a properly authenticated copy thereof, must be presented with proofs of death.

When a policy, payable by its terms to one beneficiary, if surviving, has, by the death of such beneficiary, became payable to another, proof of the death of such first beneficiary must be furnished by affidavit of respectable persons well acquainted with such deceased beneficiary.

When a policy is payable to the children in general of a person, or to any other class of persons whose names are not separately mentioned in the policy, proof must be furnished of how
97 many children there are, or of how many the class consists, and the names of the persons must be given. If all or any are of legal age, it must be so stated. If any are minors, proof of the appointment of the guardian must be furnished.

And, in general, when the policy or the death is peculiar in any respect, the forms of proof and claim must be adapted to the peculiar circumstances of the case.

And endorsed on back of said proof of death are the following words and figures, to wit:

(The following to be filled at the parent office only.) No. of claim, ———. Name of deceased, Chinonda S. Alford. No. of policy, 129,833. Amount assured, $10,000. Amount of additions, ———. Dates: Death, ———. Receipt of proofs, ———. Approval of proofs, ———. Payment of claim, ———. Proofs of death submitted to the New York Life Ins. Co., ———.

98 Also the deposition of William H. Beers, which said deposition is in words and figures following, to wit:

Deposition of Wm. H. Beers.

WILLIAM H. BEERS, sworn for the defendant, testified as follows:

1. What is your name, age, residence, and occupation? If you are officially connected with the defendant, The New York Life Insurance Company, state what that official connection is, how long it has continued, and whether or not it existed in the month of December, 1877.

To the first interrogatory he saith: My name is William H. Beers; my age is 59 years; my residence is Yonkers, New York, and my occupation is vice-president and actuary of the New York Life Insurance Company, and I have been actuary continually since 1864, and vice-president continually since 1868. I was vice-president and actuary in the month of December, 1877.

2. State what duties devolve upon and are performed by
99 you in connection with any such official position held by you in the defendant company in relation to contracts for life insurance made by said company.

In answer to the 2d interrogatory he saith: Under the by-laws of the company I am required as actuary to approve all risks submitted to the company before policies can be issued, and to sign all policies issued.

3. What, if any, duties devolved upon and were performed by you for defendant in relation to such contracts of life insurance in the month of December, 1877?

In answer to the 3d interrogatory he saith: The same duties devolved upon and were performed by me in the month of December, 1877.

4. State, if you know, how contracts of life insurance were then, December, 1877, and are now made by the defendant company; if upon any application, written or otherwise, state how such application is received and acted on, and the policy of insurance issued both at said date and now.

In answer to the 4th interrogatory he saith: Contracts of
100 life insurance were in December, 1877, and are now made by the New York Life Insurance Company upon written applications, upon forms provided by the company, and secured by and received through the company*ie*'s various agents and agencies. Such applications when received are examined by the officers and by the medical board, and, if approved, a policy is issued by the president and actuary upon the company*ie*'s current form for the plan approved and a copy of the application attached thereto.

5. Upon what, if any application, statements, communications, or representations on behalf of the applicant was the policy of life insurance No. 129,833 issued upon the life of C. S. Alford by the defendant company; and how and when was any such application received and acted upon by the defendant company? If such ap-

plications or any of them were in writing attach such writing or writings to this your deposition.

To the 5th interrogatory he saith: Policy 129,833 upon the
101 life of C. S. Alford was issued by the New York Life Insurance Company, upon an application purporting to be made by him upon the company's application form, edition of 6th December, 1875. The application is dated St. Louis, Mo., 18th December, 1877; it was received at the home office by mail on the 22d day of December, 1877, and was approved and a policy issued upon the same date. I produce the application referred to and hand the same to the commissioner.

(Application marked Ex. 1, March 28th, 1882. J. M. D., Com.)

6. State whether or not any application or statements or representations or communications were received by the officers of the company having charge of the issuance of policies from or on behalf of the applicant at or before the issuance of the said policy other than the written application mentioned in said policy. If your answer is yes, state the same fully.

In answer to the 6th interrogatory he saith: No application or statements or representations or communications were received by the officers of the company having charge of the issuance
102 of policies from or on behalf of the applicant at or before the issuance of the said policy other than the written application mentioned in said policy.

7. State any other facts within your knowledge relating to the issuance of said policy of insurance.

In answer to the 7th interrogatory he saith: There are no other facts within my knowledge relating to the issuance of said policy of insurance.

Cross-examination:

1. If in answer to any interrogatory you state that the policy was issued upon the written application, statement, communication, or representation of C. S. Alford, you will state whether or not you ever saw said Alford write, and whether or not you knew that the answers or signatures are in his handwriting. Confine yourself to your personal knowledge. If yea, state how you knew the signatures or writing is in handwriting of Alford.

103 In answer to the 1st cross-interrogatory he saith: I never saw said Alford write, and I do not know that the answers or signatures are in his handwriting of my own personal knowledge.

2. If you state that your company received any application, statement, communications, or representation from said C. S. Alford, and that it was in writing, state from whom it received it at the New York office; and, if by mail, state whether it was accompanied by any letter or letters of transmittal; produce and attach to your answer as an exhibit the letter or letters; and state who the party purporting to send the application to your New York office is, and what relation he or they then sustained to the company.

In answer to the 2d cross-interrogatory he saith: The application

purporting to be from C. S. Alford was received by mail from the company's agency at St. Louis, the advice of transmission I produce and hand to the commissioner to be attached to this deposi-
104 tion. It purports to be from William L. Hill, general agent of the company at St. Louis.

(Paper attached and marked Ex. No. 2. March 28, 1882. J. M. D., Com.)

3. If the application, statement, communications, or representations were in writing, please produce them and hand them to the commissioner to be attached as exhibits, and also state whether or not you knew them to be in the handwriting of C. S. Alford; state if you knew in whose handwriting they are, or any parts of them, and what relation the writer then bore to the New York Life Insurance Company.

In answer to the 3d cross-interrogatory he saith: The application is attached as an exhibit to the direct interrogatories; I don't know in whose handwriting any part of the application is other than as purported in it.

105 *Deposition of Dr. Chas. Wright.*

Dr. CHARLES WRIGHT, sworn for the defendant, testified as follows:

1. What is your name, age, residence, and occupation? If you are officially connected with the defendant, The New York Life Insurance Company, state what that official connection is, how long it has continued, and whether or not it existed in the month of December, 1877.

To the 1st interrogatory he saith: My name is Charles Wright; my age is 50 years; my residence is New York city, and my occupation is medical examiner for the New York Life Insurance Company continually since 1862. I was such medical examiner in the month of December, 1877.

2. State what duties devolve upon and are performed by you in connection with any such official position held by you in the defendant company in relation to contracts for life insurance made by said company.

106 To the 2d interrogatory he saith: Under the by-laws of the company I am required to examine all applications for insurance from abroad and endorse thereon my approval or rejection of the same.

3. What, if any, duties devolved upon and were performed by you for defendant in relation to such contracts of life insurance in the month of December, 1877?

To the 3d interrogatory he saith: The same duties devolved upon and were performed by me in the month of December, 1877?

4. State, if you know, how contracts of life insurance were then, December, 1877, and are now, made by the defendant company; if upon any application, written or otherwise, state how such application is received and acted on and the policy of insurance issued, both at said date and now.

To the 4th interrogatory he saith: Contracts of life insurance were, in December, 1877, and are now, made by the New York Life Insurance Company upon written applications upon forms pro-
107 vided by the company and secured by and received through the compan*ie*'s various agents and agencies. Such applications, when received, *and* examined by the officers and by the medical board, and, if approved, a policy is issued by the president and actuary upon the compan*ie*'s current form for the plan approved and a copy of the application attached thereto.

5. Upon what, if any, application, statements, communications, or representations in behalf of the applicant, was the policy of life insurance No. 129,833 issued upon the life of C. S. Alford by the defendant company, and how and when was any such application received and acted upon by the defendant company? If such applications, or any of them, were in writing, attach such writing or writings to this your deposition.

To the 5th interrogatory he saith: Policy 129,833, upon the life of C. S. Alford, was issued by the New York Life Insurance Company upon an application purporting to be made by him upon the
108 compan*ie*'s application form, edition of 6th December, 1875. The application is dated St. Louis, Mo., 18th December, 1877. It was received at the home office by mail on the 22d day of December, 1877, and was approved and a policy issued upon the same date. The application has been produced and handed to the commissioner by Mr. Beers.

6. State whether or not any application or statements or representations or communications were received by the officers of the company having charge of the issuance of policies from or on behalf of the applicant, at or before the issuance of the said policy, other than the written application mentioned in said policy? If your answer is yea, state the same fully.

In answer to the sixth interrogatory he saith: No application or statements or representations or communications were received by the officers of the company having charge of the issuance of policies from or on behalf of the applicant, at or before the issuance of the said policy, other than the written application mentioned in said policy.

109 7. State any other facts within your knowledge relating to the issuance of said policy of insurance.

To the 7th interrogatory he saith: There are no other facts within my knowledge relating to the issuance of said policy of insurance.

Cross-examination:

1. If in answer to any interrogatory you state that the policy was issued upon the written application, statement, communication, or representation of C. S. Alford, you will state whether or not you ever saw said Alford write, and whether or not you knew that the answers or signatures are in his handwriting. Confine yourself to your personal knowledge. If yea, state how you knew the signatures or writing is in handwriting of Alford.

To the 1st cross-interrogatory he saith: I never saw Alford write,

and I do not know that the answers or signatures are in his handwriting of my own personal knowledge.

110 2. If you state that your company received any application, statement, communication, or representation from said C. S. Alford, and that it was in writing, state from whom it received it at the New York office, and, if by mail, state whether it was accompanied by any letter or letters of transmittal; produce and attach to your answer as an exhibit the letter or letters, and state who the party purporting to send the application to your New York office is, and what relation he or they then sustained to the company.

To the 2d cross-interrogatory he saith: The application purporting to be from C. S. Alford was received by mail from the company's agency at St. Louis. The advice of transmission has been produced and handed to the Com'r by Mr. Beers. It purports to be from William L. Hill, general agent of the company at St. Louis.

3. If the application, statement, communications, or representations were in writing, please produce them and hand them

111 to the commissioner to be attached as exhibits; and also state whether or not you knew them to be in the handwriting of C. S. Alford; state if you knew in whose handwriting they are, or any parts of them, and what relation the writer then bore to the New York Life Insurance Company.

To the 3d cross-interrogatory he saith: The application has been produced and handed to the commissioner by Mr. Beers. I do not know in whose handwriting any part of the application is other than as purported.

EXHIBIT No. 1.

Application to the New York Life Insurance Company.

Office, Nos. 346 & 348 Broadway, New York.

Particulars required from persons proposing to effect insurance on lives in this company and forming the basis of the contract.

No. of policy, 129,833[w]. St. Louis, Mo., (post-office address.)

1. Name (in full) of the party whose life is proposed to be insured.
Chinonda S. Alford.
2. Present residence.
St. Louis, in the county of St. Louis, in the State of Missouri.

112 3. Profession or occupation. State precise nature of business.
Lumber merchant.
4. Place and date of birth.
Jefferson county, Missouri; year, 1842; month, Nov.; day, 16th.
5. Age next birthday. 36. Age nearest birthday. 35.

NOTE.—See that these ages and date of birth agree.

6. Is said party married or single?
Married.

7 A. Are the habits of said party at the present time, and have they always been, sober and temperate?

A. Yes.

B. Does the party use intoxicating drinks habitually as a beverage?

B. Yes; very moderately.

C. Is the person engaged in any way in the retailing of alcoholic liquors?

C. No.

8. Has the party had yellow fever; if so, when, where, and who was the medical attendant?

No.

9. Has the party been successfully vaccinated?

Yes.

10. Is the party subject or predisposed to dyspepsia, dysentery, diarrhœa, or any other disease or bodily infirmity?

No.

11. Has the party had, or been afflicted since childhood, with any of the following complaints?

Separate answer required to each query.

Diseases of the lungs or pulmonary complaints. No.
Spitting or raising of blood. No.
Rupture. No.
Fits or convulsions. No.
Insanity. No.
113 Rheumatism. No.
Dropsy. No.
Bronchitis. No.
Fistula. No.
Bilious colic. No.
Paralysis. No.
Apoplexy. No.
General debility. No.
Spinal disease. No.
Gout. No.
Cancer. No.
Small-pox. No.
Scrofula. No.
Eruptions or diseases of the skin. No.
Syphilis. No.
Asthma. No.
Palpitation or disease of the heart. No.
Disease of the liver, kidneys, or brain. No.
Or any serious disease. No.

12. Has the party ever met with any accidental or serious personal injury?

No.

13. Has the party ever been seriously ill; if so, when, with what complaint, and who was the medical attendant? (State his name and residence.)

No.

14. Is the said party now in good health?

Yes.

114 15. Has either of the parents or any brother or sister of said party died of or been afflicted with consumption, scrofula, insanity, gout, or any pulmonary complaint, or any hereditary disease? (State particulars.)

No.

16. A. Are the party's parents living; if so, what are their ages?

A. Father's age, if living, —. Mother's age, if living, 76.

B. If dead, at what ages and of what diseases did they die?

B. Father's age, at death, 50; cause of death, cholera. Mother's age, at death, —; cause of death, ——.

N. B.—In giving "cause of death" avoid all indefinite terms, such as "fever," "general debility," "exposure," etc. If the word "childbirth" be used specify how long after delivery the death occurred, and whether it was accompanied by any disease of the chest.

17. How many brothers and sisters has the party had?

3 brothers, 2 sisters.

18. How many are living, and what are their ages?

1 brother's ages, 34; 1 sister's ages, 53, about.

19. How many of them are dead, and at what ages and of what diseases did they die?

Brothers dead, 2, ages —; causes of death, 1, infancy; 2, infancy. Sisters dead, 1, ages —; 1, infancy.

20. What is the present and general state of health of parties referred to in queries 16 and 18?

Good.

115 21. Is the party now insured in this company, or has he ever been, and, if so, state numbers of policies and amount?

No.

22. Has the party any other insurance on his life? If so, where and for what amounts?

No.

23. Has any proposal to insure the life of said party ever been declined? If so, by what company?

No.

24. Has any proposal or application to insure the life of said party ever been made to any company or agent upon which a policy has not been issued? If so, state full particulars.

No.

25. Has any physician given an unfavorable opinion upon the life of said party, with reference to life insurance? If so, state particulars.

No.

26. Where has the party resided (during summer and winter) during the last ten years?

St. Louis.

27. Name and residence of person's usual medical attendant? On what occasions and for what diseases have you required his attendance and advice?

Has none.

If the applicant has required the services of a physician during the last seven years, or for serious illness before that period, this certificate must be procured, or the issuing of the policy may be delayed.

28. Have you consulted any other medical man? If so, for what, and when?

No.

29. Name and residence of an intimate friend?

Richard Hospes, St. Louis.

The policy will not be issued until this certificate is furnished to the company.

116 30. Sum to be insured. $10,000.

Premium, how payable. Annually.

On what table. Ordinary life.

31. Name (in full), residence, and occupation of the party in whose favor the insurance is proposed, and relationship, if any, to the party whose life is proposed to be insured?

Himself.

32. Do you desire a policy issued on the "Tontine Investment Policy" plan? If so, specify whether you select the ten-year, fifteen-year, or twenty-year tontine period.

I select the — year tontine period.

NOTE.—Insert number of years in writing.

33. Has the "Tontine Investment Policy" plan, referred to in question 32, been fully explained to you, and do you authorize the company to retain the dividends on the policy hereby applied for, and to place the same in a reserve fund in which you are to participate in accordance with the provisions made by the company regarding policies in the class you have selected, and not otherwise?

NOTE.—This question is to be answered whenever a policy is desired on the "Tontine Investment Policy" plan, and not otherwise.

34. Does the party wish a policy in the "southern class" of this company, with permission to travel and reside, at all seasons of the year, in any Southern State, it being understood
117 and agreed that in the making of dividends upon policies of this class regard shall be had to the mortality actually experienced in said class compared with the mortality of the assured.

$263.80.

NOTE.—This question is to be answered in the affirmative only by those who reside permanently south of a line beginning at the point of intersection of the northerly boundary of North Carolina with the Atlantic coast; thence running westerly along the said northerly boundary to a point one hundred miles from the coast; thence in a southwesterly direction, continuing one hundred miles from said coast to the thirty-fourth parallel of latitude; thence westerly along said parallel to the westerly border of Alabama (excepting the city of Atlanta and an area within a radius of fifty miles around it), thence northerly along the westerly border of Alabama, and along the Tennessee river to the northerly boundary of Tennes-

see; thence westerly along the northerly boundary of Tennessee and Arkansas, extended to the ninety-seventh degree of west longitude; thence southerly to the thirty-second parallel of north latitude; thence westerly along the said parallel to the Pacific Ocean.

35. Is the party aware that any untrue or fraudulent answers to the above queries, or any suppression of facts in regard to the
118 party's health, will vitiate the policy and forfeit all payments made thereon?

Yes.

I do hereby declare that the person above named whose life is proposed for insurance is now in good health, and does ordinarily enjoy good health, and that in the above proposal I have not withheld any material circumstance or information touching the past or present state of health or habits of life of said person with which the trustees of the New York Life Insurance Company ought to be made acquainted (and that I have an interest in the life of the said person to the full amount of the sum hereby applied for).

And I do hereby agree that the statements and representations contained in the foregoing application and declaration shall be the basis of the contract between me and the said company; the truthfulness of which statements and representations I do hereby warrant; and that if the same, or any of them, are in any respect untrue, the policy which may be issued hereon shall be void, and all moneys which may have been paid on account of such insurance shall
119 be forfeited to said company; and inasmuch as only the officers at the home office of the company in the city of New York have authority to determine whether or not a policy shall issue on any application, and as they act on the written statements and representations referred to, it is expressly understood and agreed that no statements, representations, or information made or given by or to the person soliciting or taking this application for a policy, or to any other person, shall be binding on the company, or in any manner affect its rights, unless such statements, representations, or information be reduced to writing and presented to the officers of the company, at the home office, in the above application. I further agree that under no circumstances shall the policy hereby applied for be in force until the actual payment to and acceptance of the premium by an authorized agent of the company during the lifetime and good health of the party whose life is proposed to be insured.

Dated at St. Louis, Mo., this 18th day of December, 1877.

*Signature of the person or persons for whose benefit the insurance is to be effected.

CHINONDA S. ALFORD.

Witness: LOUIS INGLEHORN.

120 Signature of the person whose life is proposed for insurance. (Write the name in full.)

CHINONDA S. ALFORD.

Agent: ANTHONY RUESLIN.

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*Note.—In case of husband and wife, or parent and children, the former may sign for the latter thus—Mary Smith, by John Smith.

Medical Examiner's Report.

Where over $10,000 is required the examination of applicant by two examiners is necessary.

The blanks are to be filled up by the medical examiner in his own handwriting.

1. Name (in full) of the person examined.

Chinonda S. Alford.

The examiner will satisfy himself of the identity of the person examined with the person described on the other side.

How long have you personally known the party whose life is proposed to be insured?

2. Please state the following particulars as fully and exactly as possible:

Weight, 147 lbs. Height, 5 ft. 9 in. Measure round the abdomen, 31. Circumference of the chest under the vest, ordinary state, 33½; expanded, 35½. Figure, erect. Is the general appearance 121 that of health and vigor? Yes. Hair, reddish blond. Eyes, gray. Complexion, florid. Is the skin clear and healthy? Yes. Is the gait firm and elastic? Yes. Is the muscle hard and strong? Yes. Race, white. Temperament —. Are the bones large or small? Medium.

3 A. Whether any sign of affection of the head or of predisposition to it?

A. No.

B. Whether paralysis, vertigo, tremors, catchings of any part, or any other nervous affections?

B. No.

C. Are the functions of the muscular and nervous system in a healthy state?

C. Yes.

4. Does auscultations and percussion of the chest indicate any disease of the heart or respiratory organs?

A. No.

5 A. Is the respiratory murmur clear and distinct over both lungs?

A. Yes.

B. Is the character of the respiration full, easy, and regular?

B. Yes.

C. Are there any indications of disease of the organs of respiration?

C. No.

6 A. Is the character of the heart's action uniform, free, and steady?

A. Yes.

B. Are its sounds and rythm regular and normal?

B. Yes.

C. Are there any indication of disease of this organ or of the blood vessels?

C. No.

122 7 A. State the rate and other qualities of the party's pulse?
A. 82, normal.
B. Does it intermit?
B. No.
C. Does it become irregular or unsteady?
C. No.

8. State whether subject to any cutaneous eruption on any part of body; and, if so, of what nature?
No.

9. Whether habitual cough or expectoration, occasional difficulty of breathing, or palpitation?
A. No.

10. A. Are the functions of the abdominal and urinary organs in a healthy condition?
A. Yes.
B. Are there any indications of Bright's disease of the kidneys?
B. No.
C. If any rupture, state whether reducible or not, and if a truss is worn.
C. ———.

11. Has the person any predisposition, either hereditary or acquired, to any local or constitutional disease?
No.

12. Have the person's parents, brothers or sisters, been afflicted with pulmonary or other diseases, hereditary in their nature?
No.

13. A. Has the person ever had any severe injury or illness?
A. No.
B. If so, has it had any effect on his constitution?
B. ———.
C. Is there any indication that he is not now entirely well?
C. No.
D. Whether deaf, dumb, blind, or lame?
D. No.

123 14. A. Does the party habitually use ardent spirits, wine, or malt liquors?
A. No; rarely.
14. B. If so, to what extent?
B. Very moderately.

14. C. Are there any indications that would lead you to suppose that the applicant has led, or leads, other than a sober and temperate life?
No.

15. If the person's weight be much over or under the average, or if the family history, or if any disease or injury, or any other circumstance connected with him (or her) should seem to affect seriously the character of the risk, the reason for recommending it should here be given.

16. A. Have you carefully read the answers of the applicant in the annexed application?
Yes.

B. Do they reveal any facts which you deem of special importance to comment upon in your report; and, if so, what are they?

B. No.

17. Has the medical examiner asked the necessary questions to satisfy himself that the material statements as to the family history, personal habits, and past and present health of the applicant in the within application are correct?

Yes.

18. Signature of party examined written in presence of the medical examiner.

C. S. Alford.

124 19. A. Were you to divide according to probable longevity all persons of same age and sex as applicant into five classes, would you place applicant in the first and best class, second, third, fourth, or fifth class?

A. First.

NOTE.—The limits of each class will be clearly defined by the understanding that each class is to embody an equal number of individuals.

B. Do you recommend that a policy be issued (yes or no)?

B. Yes.

The medical examin*ation* is earnestly requested to answer the above questions minutely, and to propose such other queries as in his judgment are necessary for a full elucidation of the risk.

Should the examination develop points of doubts as to the safety of a risk believed on the whole to be good, the examiner may send a letter direct to the company at New York with full explanations. This letter will be considered strictly confidential.

The examiner will feel the responsibility of his position, bearing in mind that on deciding whether to accept or decline a risk at a distance, the company place great reliance upon his statements.

125 If hereafter it should turn out that this examination had not been thorough; that due care had not been used; that the assurant was not so good a subject as has been represented, it would be not only detrimental to the interests of the company, but injurious to the examiner.

The examiner will require the applicant or agent to procure the family physician's certificate, as it may contain important suggestions, unless such certificate is clearly unnecessary.

G. BAUMGARTEN, M. D.,
Medical Examiner.

Examined at St. Louis, this 19th day of December, 1877.

Additional remarks.

App'c. Dec. 22, '77. C. W.

Received Dec. 22, 1877, home office. 129,833.

126 EXHIBIT No. 2.

NEW YORK LIFE INSURANCE COMPANY.
AGENCY, ST. LOUIS, *Dec.* 20, 1877.

To the New York Life Ins. Co., New York City:

Enclosed I hand you two applications, as per memoranda below. Please forward policies to me at No. 417 Pine St., [St.] Louis, Mo.

Very respectfully, yours,

WM. L. HILL,
WM. S.,
General Agent.

Name.	*Amount.*	*Remarks.**
C. S. Alford	10,000	Ordinary life.
James McGuire	1,500	" "
	5,000	

Held for correction.

*For special remarks or instruction see application.

Deposition of William L. Hill.

WILLIAM L. HILL, sworn for the defendant, testified as follows:

Direct examination by Mr. JUDSON:

Q. What is your business?

A. I am general agent of the New York Life Insurance Company in St. Louis.

Q. Did you hold such position in the year 1877, and have you held it since?

A. Yes, sir.

Q. Who was the manager of the company at that time representing the company here?

127 A. I was the manager and general agent in charge of the St. Louis office.

Q. Was there any other manager or general agent of the company here at that time?

A. There was not.

Q. What position did any other party or parties have here with regard to the company?

A. Merely as agents for the soliciting of applications.

Q. State whether or not you had anything to do with the soliciting of the particular application that is in controversy here.

A. No, sir; I had not.

Q. Did you hear me read in evidence from the application and the statement which were forwarded to New York?

A. Yes, sir.

Q. Did those go through your hands to be forwarded to the office in New York?

A. They went through my office.

Q. Did you receive this policy No. 129,833 from New York?

A. Yes.

Q. What was done with it upon your receipt of it?

A. We made a record of it on the books, and it was then given to Mr. Roeslein to deliver.

128 Q. What is the total amount of premiums that was paid by Mr. Alford upon this policy?

A. The first year there was paid $264.80; that includes a dollar for the policy fee. In 1878 there was paid $263.80; and in 1879 there was paid $263.80. There was deducted from the last two premiums two dividends aggregating $74.92, which would reduce the amount paid by Mr. Alford to $717.48, which is the total amount that he paid in the three years, including the policy fee of one dollar.

Q. Have you made any computation of interest at six per cent. from the time of those net payments by Mr. Alford to the present time?

A. Yes, sir; $170.78 the interest amounts to, which, added to the amount of $717.48, makes a gross sum of $888.26. That sum, $888.26, represents the total net amounts paid by Mr. Alford to the company with six per cent. interest up to the present day.

Q. Have you that amount, $888.26?

A. I have. (Producing same.)

129 The court having ruled, in overruling the demurrer, that the policy in suit was a Missouri contract, and subject to the provisions of sections —, vol. 2, Revised Statutes of Missouri, defendant's counsel excepted on ground that the policy was a New York not a Missouri contract, and not subject to said provision; and thereupon defendant's counsel made a tender in court to plaintiff in United States legal tender currency of sum of $888.26, being the amount of the net premiums and all payments made by the plaintiff's testator to the defendant company upon the policy in suit, with six per cent. interest thereon from the date of such payments to the day of trial. Which said tender was by plaintiff declined as full payment.

Cross-examination by Mr. REYNOLDS, counsel for plaintiff:

Q. The Mr. Anthony Roeslein that you speak of was one of the soliciting agents of the company here, was he not?

A. Yes, sir.

Q. He collected the other two premiums as well as the first premium, did he not?

A. I don't know; sometimes the premiums are paid over the counter, and sometimes they are collected.

Q. He testified on the last trial of this case that he collected them, you cannot say that he did not?

A. No, sir.

130 Q. You do not know whether Mr. Roeslein in fact collected these premiums from Mr. Alford or not?

A. I only know that I received the money from somebody.

Q. Is that the envelope that the policy was in (handing an envelope to witness)?

A. I presume so.

Deposition of Dr. Baumgarten.

GUSTAVUS BAUMGARTEN, sworn for the defendant, testified as follows:

Direct examination by Mr. JUDSON:

Q. State your residence and occupation?
A. I reside at 2631 Chestnut street, St. Louis; and am a physician.
Q. Are you connected with the defendant company in any way?
A. Yes, sir; as medical examiner.
Q. Were you connected with that company in December, 1877?
A. Yes.
Q. How long have you been practicing medicine?
A. 23 years.
Q. Are you acquainted with the disease known as diabetes?
A. Yes.
Q. What are the characteristics of that disease?

131 A. It is a disease of nutrition, concerning a pathological morbid formation of sugar, or the existence of sugar in the blood, which is passed by the urine, causing a great increase in the quantity of urine.

Q. Is it what you denominate a chronic disease, as distinguished from an acute disease?
A. Yes, sir; it is a chronic disease.
Q. State whether or not it is a serious disease?
A. It is a serious disease.
Q. State whether or not it is a steadily progressive disease, or an intermittent disease, and at times an occult or hidden disease?
A. It may be either; it may progress steadily towards death, or it may make pauses, when influenced by certain conditions, especially conditions of dirt and treatment; perhaps, it may be put in abeyance for some time, that is, it may make no outward symptoms.
Q. How is it as to the presence of sugar in the urine; is that constant?
A. No, sir; it is not necessarily constant; sometimes the sugar disappears from the urine altogether.

Q. How is it as a disease to be disclosed necessarily by a
132 medical examination without disclosure from the party?

A. In certain cases there might be a suspicion of the disease from emaciation, excessive thirst, and excessive hunger, too, and an excessive amount of urine.
Q. How would you characterize the disease as to its curability?
A. I don't regard it as curable at all.
Q. You may explain your view as to that.
A. My view is that in the course of time every case of diabetes leads to death; frequently in the course of one or two years, sometimes in the course of five, six, eight, or even ten years.
Q. State whether or not you would denominate it a dangerous disease?
A. Certainly, it is a serious disease.
Q. From your knowledge of the disease, if a party were treated for

diabetes for a period of a year, say in 1875, and thereafter apparently recovered to outward appearances, was taken again with the disease in the summer of 1880, and died in September, 1880, of diabetes, what would you say as to the connection of the disease of which he died with the disease for which he was treated in the year 1875?

A. I would say that it was simply the same case.

133 Q. Explain your reasons for that view.

A. My reasons are that the common experience is that persons afflicted with diabetes can be put into apparently perfect health for a certain length of time, but that this condition of health never will persist, that is, unless they die accidentally in the meantime; they will always have a recurrence of the same disease.

Q. Do you remember examining Mr. Alford for insurance in December, 1877?

A. No, sir; I don't remember the appearance of the gentleman.

Q. Do you examine many parties for insurance?

A. Yes, sir; a great many.

Q. About how many in the course of a year?

A. I should think from 250 to 300.

Q. Are your reports to the company made orally or in writing?

A. In writing, on the same piece of paper on which the application is.

Q. Here is the medical examiner's report on the back of the original application in this case (handing same to the witness). Is that your signature?

134 A. Yes, sir; that is my handwriting throughout, excepting the signature of the party examined.

Q. This contained a number of questions concerning the existence of different diseases or disorders of the body. Please examine it and state how you made that report.

A. Partly from my own observation and partly from asking him questions.

By Mr. REYNOLDS:

Q. Are you stating as to this particular case or your general custom?

A. My general custom.

Q. Do you remember anything about this particular case at all?

A. No, sir.

By Mr. JUDSON:

Q. If you do not recall this particular case you may state how you ordinarily conduct a physical examination as reported in such a report as that.

A. Partly by observation; for instance, I am asked to state the rate and quality of the pulse, I do that by feeling and counting his pulse; I am also asked the question if the party habitually

135 uses ardent spirits or intoxicating liquors. I could not possibly answer that question without asking the party in regard to it, and of course in my answer I am guided by his answer.

Q. Take such question as this: "Has the party ever had any severe injury or illness?"

A. I could not know that without asking him the question and I would have to rely upon his answer. Of course I am guided partly by his own written application.

Q. State whether or not that written application is before you at the time you make this report?

A. Yes, sir; it is before me. I never make an examination without having the application before me; I am not allowed to do so.

Q. Can you state from examining this particular paper which you forwarded whether or not the written application in this case was before you at the time you made that report?

A. Yes, sir; it was.

Q. Can you state whether or not the answers contained in
136 this medical examiner's report are the answers given you by the party and which you wrote down?

A. Yes, sir; they are.

Q. I find this question among them, numbered 10: "Are the functions of the abdominal and urinary organs in a healthy condition?" State how, as a medical man, you could make answer to or report upon that.

A. By asking him, for instance, concerning his appetite, concerning his bowels; by percussing and feeling the region of the liver, &c.

Q. As to the disease of diabetes, if its presence were not manifested by the personal disclosure of the party, state how it could be ascertained by a medical examiner, if not apparent in the urine at the time.

A. Sometimes it could be suspected by emaciation; for instance, by the appearance of the face and skin, &c.; in other cases it could not be suspected.

Q. Please examine the answers here as to the height and weight of the applicant, and state whether from them he was at that
137 time in an emaciated condition.

A. No, sir; that is a very fair weight for the height. He was five feet nine in height and weighed 147 pounds; that is not a fat man nor an emaciated man.

Q. State whether a man of that height and weight would suggest to a medical examiner the presence of diabetes.

A. No, sir; it would not.

Q. From that report it appears you recommended that the policy be issued.

A. I believed so.

Q. State whether or not you knew at the time that this party had had diabetes.

A. No, sir.

Q. State whether, if you had known that fact—that he had the disease in 1875, was treated for it for about a year, and thereafter apparently recovered and had no sym-toms for some time prior to this examination in 1877—you would have recommended the policy to issue.

A. Certainly not.

Q. You may state your reason for that answer.

138 A. My reason is that which I have given in my view of the disease, that the disease, though it may be latent for some time, is never in abeyance. I consider a man who has had diabetes not a good risk for insurance, as he is always liable to have the disease flare up again and die of it; in fact, he is not only liable, but he is very certain, to die of it.

Q. State whether the man whom you examined in the case of this particular application signed his name there or not?

A. He did.

Q. Is that before or after you make your written report?

A. It is before I make out the report; it is about the last thing in my examination; I allow the party examined to write his name when I finish my examination and before I write out my report.

Q. In speaking of the particular disease in question by what medical name is it known?

A. Saccharine diabetes.

Q. In what organ of the body does it commonly manifest itself?

139 A. It is, as I stated, a general disease of nutrition, showing itself by a superabundance of sugar in the blood, which is execreted by the urine; the kidneys, therefore, have a large share in the disease.

Q. State whether or not the disease of diabetes, as you described it, is commonly known as a disease of the kidneys?

A. Popularly speaking, people might call it a disease of the kidneys, or they are apt to call it a disease of the kidneys, but it is really a disease of nutrition. We cannot say that it is a disease of any particular organ.

Q. State what effect, if any, the disease has in its course upon the kidneys.

A. After its existense for a long time the kidneys become diseased from overwork; the presence of sugar in the blood, which has to be execreted by the kidneys and always produces a large amount of water, throws a very large amount of work upon the kidneys,

140 and the disease of the kidneys which follows is one that would usually follow the overwork of the kidneys,

Q. What is the effect of that overwork upon the kidneys?

A. The kidneys undergo a chronic sort of inflammation, and the result will probably be contracted kidneys, which is itself a fatal disease.

Cross-examination by Mr. REYNOLDS:

Q. What kind of a looking man was Mr. Alford?

A. I don't know; I don't remember him.

Q. What sized man was he?

A. I don't remember.

Q. Where did you see him?

A. I don't know at what place; I am under the impression that I examined him in his office, but that is all I know about it.

Q. Where was his office?

A. I don't know.

Q. What examination did you make of him?
A. The same as in any other case, partly physical and partly oral.
Q. How can you state that if you do not remember the
141 man and do not remember having examined him?
A. I have the evidence of that in my report.
Q. And that is all you have?
A. Yes, sir.
Q. You have no recollection whatever of this matter except from this report?
A. Nor, sir; except that I remember also the name; I was impressed by the unusual name, "Chenonda."
Q. You remember that from the fact of your having testified in this case once before?
A. No, sir; I remember it independent of that.
Q. But you have no recollection of this case at all?
A. No, sir; not any distinct recollection of the examination, except that I am under the impression it was in his place of business.
Q. You have no recollection of the answers that he gave?
A. No.
Q. You have no recollection of the questions you asked him?
A. No, sir; none further than my report.
Q. That is to say, you find that you did sign a report about
142 the examination of somebody of that name, and because you did so you suppose what you took down was correct?
A. Yes, sir.
Q. That is all you know about it?
A. Yes, sir.
Q. As to the facts of the matter you don't know?
A. No, sir.
Q. You do not know whether some one personated him or not?
A. No, sir.
Q. You don't know but what it was a different man you examined?
A. I do not.
Q. You say you saw the man that you examined sign this blank?
A. Yes, sir.
Q. Are you sure of that?
A. Yes, sir.
Q. How do you know that?
A. Because I made the examination, and that is the only way it is done.
Q. How do you know that in this instance that blank was not signed before you made the examination?
A. I know that perfect*fect*ly well, because in that ca*use* I would have rejected the blank immediately.
Q. That is to say you know it from your custom?
143 A. I should not have made an examination on any such blank.
Q. That is, you don't think you would?
A. Yes, sir; I don't think I would.

Q. But you do not know from anything you remember now about it but what this may have been an exception to your practice?

A. No, sir; I could not swear to that, except that I think the exception was almost impossible.

Q. Still you cannot swear that it was not an exception?

A. No, sir

Q. Then the truth of the matter is that you don't remember anything this?

A. Nothing except what I tell you.

Q. Except that you see that this is your signature to an application, and that is the only thing you do remember in regard to the matter?

A. No; the whole report is in my handwriting with the exception of the signature of the party examined.

Q. I mean to say the writing in the report is yours, and the signature of yourself as medical examiner is to it, but apart from that you have no recollection of the circumstance?

144 A. No, sir.

Q. You don't even know whether the man had red or black hair?

A. No, sir.

Q. Or blue or brown eyes?

A. No, sir.

Q. Or whether he was five ten or five feet six, or whether he weighed 120 or 180 pounds?

A. No, sir; except by looking at the blank.

Q. Did he have consumption?

A. I think not.

Q. Did he have any symptoms of it?

A. I think not.

Q. How do you know?

A. Because I would not have recommended him if he had; I would not have made out that report if he had.

Q. But apart from that you do not remember?

A. No, sir.

Q. Then your recollection of his physical condition, as you are testifying to it now, is simply based upon the fact that you signed this kind of report and you do not think you would have signed it if it was not correct?

A. I don't think I testified as to his physical condition.

145 Q. Did you examine his urine?

A. No, sir; I have no evidence that I did.

Q. You won't say that you did not?

A. Yes; I can say that much.

Q. You are never in the habit of examining the urine of persons that you examine for insurance companies?

A. Yes, sir; frequently.

Q. But you don't remember doing it in this case?

A. No, sir.

Q. Will you say that you did not?

A. Yes, sir; the presumption is very strong that I did not.

Q. I am not asking about presumption, but whether you will say positively that you did not?

A. No, sir; I cannot say positively.

Q. And the presumption that you did not is simply from the fact that you do not notice it in your report?

A. Yes, sir.

Q. When you filled up the application did you not merely have the applicant sign it in blank, and then go on and examine his pulse, his heart, and his lungs externally?

A. I cannot testify to any such thing the evidence that I
146 have of the case; is that I had him sign that blank after I had made the examination.

Q. Do you know whether he signed that blank before or after you put in those answers to the questions that you have in there in your report?

A. Very likely.

Q. Never mind what is very likely, but please answer my question. Do you know whether or not he signed his name in the blank before or after you filled it up?

A. No, sir; I do not.

Q. You do not remember anything about that?

A. No, sir.

Q. It might have been in blank as to the answers you put in, or the result of your examination when he appended his signature?

A. As I say, it is not at all likely, but I cannot swear that it is not so.

Q. Then the upshot of it all is that you do not know anything about this particular case as a fact?

A. No, sir.

Q. Is there more than one form of diabetes?

A. There are two diseases called by the name of diabetes, they are *diabetes mellitus* and *diabetes insipidus*.

147 Q. Do I understand you to say that either form is a disease of the kidneys?

A. No, sir.

Q. I understand you to say that it frequently happens in the disease of *diabetes mellitus* that the kidneys become affected?

A. Yes, sir; from the surcharge of saccharine matter, from the overwork in getting rid of that matter.

Q. At what stage of the disease does it occur that the kidneys become affected?

A. At a later stage; but then I could not say exactly as to the time.

Q. Did I not understand you to say in your examination-in-chief that when the kidneys did become effected the disease was incurable?

A. Yes, sir.

Q. And is it not also a fact that when the disease has reached such a stage as to effect the kidneys and make it a disease of the kidneys, death ensues in a short time thereafter?

A. Not necessarily; no, sir.

Q. Do you know of any cases to the contrary?

A. Yes, sir.

Q. How many?

A. I can't tell you that.

148 Q. Do you say that is the rule?

A. I don't say anything about the rule.

Q. Is it not the rule that the affection of the kidneys is the last stage of the disease?

A. No, sir; patients may die of diabetes without ever having the kidneys affected.

Q. Then it is not necessarily a disease of the kidneys?

A. No.

Q. But if they do have an affection of the kidneys in the progress of the disease, is it not in the last stage of the disease?

A. Yes, sir?

Q. Then, is it at all probable that a man's kidneys would be affected in 1877 and he would only die of the disease in 1880? A. No, sir.

Q. It is not probable?

A. No, sir.

Q. Then if a witness answered the question as to his disease of the kidneys it might be that he had diabetes, and yet not have had the kidneys affected?

A. Yes, sir; but persons would usually answer, under diabetes, as having had disease of the kidneys. I mean that if the person who has had or has diabetes is asked the question whether

149 he has a disease of the kidneys he will probably say yes.

Q. That is assuming, then, that the person who answered was not posted as to the disease?

A. Yes, sir.

Q. If a person had been under the care and treatment of a skil-ful physician, would he be apt to fall into that mistake?

A. Yes, very likely he would.

Q. Notwithstanding the fact that his physician might have instructed him that his kidneys were not affected?

A. If he was told by his physician he might not.

Q. If a man had been under the care and treatment of a physician who was skilled in the proffession and knew what was the matter with him, do you undertake to say that in case of that kind the patient would usually answer that he had a disease of the kidneys?

A. I don't undertake to say that.

Q. You don't undertake to say anything of that kind, do you?

A. No, sir.

Q. But you do say that you do not think it is likely a man's

150 kidneys would be affected and he would live three years longer?

A. No, sir.

Q. I understand you to say that diabetes is incurable?

A. Yes, sir.

Q. I suppose you are giving that statement on authority and your own experience?

A. Yes, sir; and on the great bulk of the testimony of the profession.

Q. Do you say that recovery is impossible or improbably?

A. No, sir; I don't say impossible; I say it is most unlikely.
Q. What produces diabetes?
A. I don't know.
Q. What does it result from?
A. I don't know.
Q. Is there any relief from it?
A. Yes, sir; there is relief.
Q. Is relief so far possible that a man may honestly suppose himself cured of it?
A. Yes.
Q. Can a man tell from his own feelings and his own symptoms, whether he has or has not that disease?
A. Sometimes not in the course of it.
Q. A man might honestly answer, then, that he had not the disease?
A. Yes, sir.

151 Q. And might believe that he hadn't it, when, by a chemical or microscopic examination, it might be determined that he had the seeds of the disease in him?
A. Not even that; perhaps it could not be even detected by science.
Q. Then even if a man were asked if he had diabetes and said he had not, there is no supposition that he has aswered falsely if it turns out several years afterwards that he dies of that disease?
A. No, sir.
Q. He might have it and be unaware of it?
A. Yes, sir.
Q. Do you mean to be understood as saying that the presence of this disease can be told from an external examination and from the appearance of the patient?
A. Yes, sir; when the disease is actively present it can be frequently told by the appearance.
Q. But if it is in abeyance?
A. Then it cannot.
Q. If it is in its incipient stages, can it?
A. No, sir.
Q. Then is it not one of those kinds of diseases that to detect its presence requires a chemical, or some other test, apart from a mere external examination of the patient?

152 A. Yes.
Q. Then how does it happen that even if a person under examination would answer you that he had not a disease of that kind you would rely on his answer?
A. For the reason that an examination in life insurance, as well as an examination of any patient for any purpose, is a very limited thing; we do not examine for a thing that there is no suspicion of; that is impossible; we could not spend a year in examining a patient for a life insurance policy.
Q. You had every opportunity to examine him and to examine his urine?
A. I suppose so, but I have no recollection in regard to it.
Q. You have no recollection of his making any objection to any thing of that kind?

A. No, sir; not at all.

Q. And yet you say that even the patient himself or the applicant might not have known of the existence of this disease, and nothing but a chemical or microscopic examination would have disclosed its presence, and that would not even do it in all cases?

153 A. No; that would not do it in all cases.

Q. What do I understand you to say is the pathology of diabetes?

A. I did not make any explanation of that.

Q. Can you?

A. No, sir.

Q. You are not capable of doing it?

A. No, sir.

Q. Why not?

A. Because nobody else is.

Q. That is your opinion?

A. Yes, sir.

Q. What are the functions of the kidneys?

A. To excrete urine.

Q. And secrete it.

A. Or secrete it, just as you choose.

Q. Is it not a fact that the kidneys may be in a perfectly healthy condition and still secrete, or excrete as you call it, the urine charged with sugar?

A. Yes, sir; they must be.

Q. Do I understand you to say that there are no instances of the cure of diabetes?

A. That is my belief.

Q. Do you undertake to say that the answers that are written down there in your report are the answers that were given to you by this particular man himself, or did you take those answers from the application that had been made to Roeslein?

154 A. No, sir; I got the answers so far as I had to get them from the applicant himself.

Q. You are certain of that?

A. Yes, sir.

Q. Do you remember in this instance that you did that?

A. No, sir; but I always do it.

Q. You do not say that you did it in this case, though?

A. No, sir; I won't say that.

Redirect examination by Mr. JUDSON:

Q. You have stated on your cross-examination that a man may have not only the seeds of diabetes, but have the disease itself latent in his system, without being personally aware of it?

A. I mean to say that if he has had the disease, the disease is not therefore cured because it is not apparent either to him or to his physician at the time.

Q. When you state that you do not know about this particular case state whether you mean to say anything more than that the

circumstances of the individual facts in this case other than
155 what is recalled to you by the paper submitted to you are not remembered by you?

Plaintiff's counsel objects to the question as incompetent. Objection sustained. To which ruling of the court defendant then and there excepted.

Q. You have described diabetes as a disease which may exist in the patient and not only be not apparent to himself, but even not apparent to a medical man upon examination?

A. Yes, sir.

Q. State whether or not in such a disease it is or is not important that the existence of it in the past be disclosed upon an examination as to the physical condition of the subject?

A. Yes, sir; that is the only thing that can be known about it by an examiner.

Q. In other words, the only thing that can be known about it is its past existence in the subject?

A. Yes, sir.

Defendant's counsel offered in evidence the application made by Chinonda S. Alford, deceased, to the Penn Mutual Life Insurance Company, of Philadelphia, on December 18, 1877, *in* which
156 application—signed by said Alford; and read therefrom the following questions and answers therein recorded:

"Q. Has the party ever been afflicted with any disease?

A. Yes; kidney disease, 1875.

Q. How long since he was attended by a physican or professionally consulted one?

A. About two years ago; kidneys.

Q. Name and residence of his usual medical adviser or family physician?

A. Dr. Brokaw, of St. Louis.

Q. Sum to be insured?

A. $5,000.

Q. Kind of policy?

A. Life policy. Premium to be paid annually, 30 per cent. in notes."

Endorsed on the application is "annual premium $134.10."

It is admitted that this application was made by Alford on the same day that the application was made by him to the New York Life Insurance Company for the policy in suit, but prior thereto, the application to the Penn Mutual being made in the forenoon and that to the New York Life Insurance Company in the afternoon;
157 that the application was forwardad to the Penn Mutual and returned by that company about the date of the modification certificate as rejected unless the application was amended by changing it from a life policy to a fifteen-year endowment policy; that Mr. Alford did so amend his application at the dates given in the

certificates and the policy was issued on the fifteen-year endowment plan, the annual premium being increased to $342.20.

Said application and papers are as follows, to wit:

158 N. B.—Date this in full, place and day, and see that the signatures is witnessed.

ST. LOUIS, *January* 2*d*, 1878.

To The Penn Mutual Life Insurance Company of Philadelphia:

I hereby amend my application for life insurance made to your company, on the 18th day of Dec. 1877, in the following particulars, viz: By making the answer to question No. 2 read, the policy is to be payable to me or to my estate instead of to my wife.

C. S. ALFORD.

Witness: CHARLIE SHAW.

159 N. B.—Date this in full, place and day, and see that the signature is witnessed.

ST. LOUIS, 2*d January*, 1878.

To the Penn Mutual Life Insurance Company of Philadelphia:

I hereby amend my application for life insurance made to your company, on the 18th day of Dec., 1877, in the following particulars, viz: By making the answer to question No. 24, the policy is to be on the 15-year end't plan, prem't pay'l (20% note, 1st year) annually; the policy for $5,000.

C. S. ALFORD.

Witness: CHARLIE SHAW.

159½ Form No. 63, 5, '77.

The Penn Mutual Life Insurance Company.

Nearest age, 35. Office, No. 921 Chestnut street, Philadelphia, Pa.

Annual prem.		$134 10
30 % note		40
		94 10
6 % int.		2 40
		96 50

Questions to be carefully read and attended to by the party applying for insurance.

Answers to be given separately and distinctly, and agreed to by said applicant as the basis of this contract. Write Christian name plainly and in full.

1. A. Name in full. A. Chinonda S. Alford.

B. Post-office address of the person whose life is proposed to be insured. B. St. Louis.

C. Present occupation and previous occupation. State exactly what. C. Lumber dealer.

D. Has he ever been, or is he, employed in the Army or Navy? D. No.

E. If a married woman or widow, state also her maiden and husband's name. E. Maiden name, —— ——; husband's name, —— ——.

2. A. Name and (B) post-office address of the person for whose benefit the insurance is proposed. A. Hermion Alford. B. St. Louis.

C. Relationship to the party whose life is to be insured. C. Wife.

D. If a married woman or widow, state also her maiden and husband's name. D. Maiden name, Hermion Read; husband's name, —— ——.

3. Place and date of birth of the person whose life is hereby proposed to be insured. Born at county of Jefferson, State of Missouri, 16 day of Nov., 1842; age nearest birthday, 35.

4. Is the said person married, single, widower, or widow? Married.

5. A. Has the said person been regular, correct, and temperate in his habits? A. Yes.

B. Is he so now? B. Yes.

6. Does the said person use (A) alcoholic stimulants, (B) opium, or (C) any narcotic? If either, state how often and in what quantity. (D.) What has been his habits in this respect through life? Answer fully and specifically each question. A. No. B. No. C. Tobacco only. D. Temperate, moderately.

7. A. Is the party engaged in the manufacture or sale of beer, wine, or any other intoxicating drinks? A. No.

B. Has he ever been so engaged? State full particulars. B. No.

8. A. Has he been successfully vac-inated & revaccinated? A. Yes.

B. Has he had small-pox or varioloid; if so, at what age? B. No.

C. Has he had the ordinary disease of childhood, scarlet fever, measles, whooping-cough, and mumps? C. Yes.

[In red ink:]

35.

23232	5,000 15 E.
Jan. 5, '78.	342 20 cash.
	68 00 note.
K. 315.	274 20
	4 08 int.
	278 28 cash.

160 9. Has he ever been afflicted with insanity, apoplexy, palsy, convulsions, vertigo, neuralgia, delirium tremens, congestion, inflammation, or any other disorder of the brain or nervous system? If so, name the disease. No.

10. Has he ever suffered from spitting of blood, habitual cough, difficulty or shortness of breath, pain in the chest, palpitation, or any disease of the throat, heart, or lungs? No.

11. A. Has he ever been affected with or subject to any of the following diseases? Answer each question separately, and state particulars in the margin. Asthma, no; disease of heart, no; fever, typhoid, no; pneumonia, no; bronchitis, no; disease of kidneys, yes; kidney d-ease, 1875; fever, typhus, no; prolapsus ani, no; cancer, no; disease of liver, no; fever, yellow, no; rheumatism, no; cholera, no; disease of skin, no; fistula, no; scrofula, no; cholera morbus, no; dropsy, no; cravel, no; stricture, no; colic, no; dysentery, no; gout, no; tumors, no; chronic diarrhœa, no; dyspepsia, no; jaundice, no; ulcers, no; diphtheria, no; fever, intermittent, no; piles, no; varicose veins, no; disease of bladder, no; fever, remittent, no; pleurisy, no; venereal disease, no; (B) or any complaint or disease whatever? If so, state what disease, and how often. None other.

[In red ink:] C. Shaw & Co., managers, St. Louis, Mo.

12. A. Has he ever received any serious personal injury? If so, state full particulars. A. No.

B. Has he a hernia, or has he ever been ruptured? B. No.

C. If so, does he now wear a suitable truss? C. ——.

D. Will he agree to wear one while insured in this company? D. ——.

13. Has any near relative been affected with or died of consumption, cancer, disease of the heart, or any scrofulous disease, apoplexy, insanity, gout, or disease of the kidneys? No.

14. Has he resided in an unhealthy district? If so, where, for how long, and with what effect upon the health. No.

15. State the following particulars in regard to h— grand parents and parents, brothers and sisters:

	Age, if living.	State of health.	Age at death.	Cause of death. (See marginal note.)	How long sick.	Previous health.
Father's father			Old	Don't know	Don't know	Good.
Father's mother			Don't know	"	"	Don't know
Mother's father			75 to 80	"	"	"
Mother's mother			Old	"	"	"
Father			50	Cholera	One day	Good.
Mother	76	Good.				

[On margin:] NOTICE.—In giving the cause of death, avoid all indefinite terms, such as "general debility," "change of life," "fever," "exposure." If the word childbirth be used, state how long after delivery death occurred, and whether there were any sym-toms of disease of the chest, such as cough, expectoration, etc.

16. How many full brothers has the party had? 3; living, 1; ages, 34. Present and past health, respectively, good; dead, 2; ages, very young. Of what disease did they die? (See marginal note.) How many half brothers? None.

17. How many full sisters? 2; living, 1; ages, 50. Present and past health, respectively, good; dead, 1. Of what disease did they

die? (See marginal note.) Infancy. How many half sisters? None.

160½ 18. A. How long since he was attended by a physician, or professionally consulted one? A. About two years.

B. For what disease? B. Kidney.

C. Give the name and residence of the physician who attended h—. C. Dr. F. V. L. Brokaw, St. Louis, Mo.

D. Give the name and residence of h— usual medical adviser or family physician, to whom he refers for a certificate. D. Dr. Brokaw.

19. Give the name, residence, and occupation of an intimate friend, to be referred to, if necessary. E. H. Warner, lumber, St. Louis.

20. Does the person expect to travel? If so, how much each year; in what direction and manner; and through what district of country? Ordinary traveling.

21. A. Has the said party h— life insured? If so, give the name of each company and the amounts in each, with the kind of policy. A. No.

B. Has any proposals or application to insure the life of said party ever been made to any company or agent, upon which a policy has not been issued, or are any negotiations now pending with any party for a policy on his life? If either, state full particulars. B. No.

C. Has any physician given an unfavorable opinion of said party, with reference to life insurance? If so, state particulars. C. No.

22. Is there any other information respecting the present or former health, habits, and circumstances of the said person, with which this company ought to be made acquainted, as likely to influence it in issuing a policy? No.

23. A. Is the party aware that any untrue or fraudulent allegations or omission made in this application for the proposed insurance will render the policy void, and that all payments of premiums made thereon and dividend credits accruing therefrom will thereby be forfeited? A. Yes.

B. Has he fully understood the questions which he has answered above? B. Yes.

24. Sum to be insured, $5,000; kind of policy, life. How is the premium to be paid? Annually; 30% note, 1st year. How is the surplus to be used? To reduce premiums.

—— ——.

—— ——.

(Strike out whichever is not wanted.)

[In red ink:] 15 E. 20% note.

It is hereby covenanted and agreed, that the declaration and the above-mentioned answers and proposals contained in the foregoing application, whether written by h— *and hand* or not, every person whose name is hereto subscribed adopts as h— own, and warrants to be full, complete, and true, and to be the only statements given to the company in reply to its inquiries, which shall be the basis of the contract between the undersigned and "The Penn Mutual Life Insurance Company."

It is hereby further covenanted and agreed that if there has been any suppession or omission of any fact by the party making this application, or if any untrue or fraudulent allegation be contained herein or in the foregoing answers and proposal, all moneys which shall have been paid on account of such insurance shall be forfeited to the said company, and the policy of insurance made on the
161 faith of this declaration and of the above answers and proposal shall become null and void and of no effect.

And it is hereby further covenanted and agreed: (1st), that under no circumstances shall the foregoing application and agreements constitute a contract of insurance until a policy shall first have been issued and delivered by the said company, and the first premium thereon actually paid, during the continuance in good health of the life proposed for insurance; (2d), that if the insurance applied for be granted by the company the policy if accepted will be accepted subject to all the conditions and stipulations contained in the policy, and that, in particular, no insurance shall be claimed to be thereby granted against death by self-destruction; (3d), that in any distribution or surplus the principles and methods which may be adopted by the company for such distribution, and its determination of the amount equitably belonging to such policy, shall be and are hereby ratified and accepted by and for every person who shall have or claim any interest under the contract now proposed.

And it is hereby further covenanted and agreed that no statements, representations or information made or given to the person soliciting or taking this application for a policy of insurance, or to any other person, shall be binding on the said company, or in any manner affect its rights, unless such statements, representations or information be in writing in this application when the said application is received by the officers of the said company at the home office.

And it is hereby further covenanted and agreed that the officers of the said company, at the home office in Philadelphia, alone shall have authority to determine whether or not a policy of insurance shall be issued on this or any application to the said company, or whether or not any insurance shall take effect under such application; and the entire contract contained in this application, and any policy that may be issued thereon, taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations, in accordance with and subject to the charter of said company and the laws of the State of Pennsylvania, the place of the contract being expressly agreed to be the principal office of the company in the city of Philadelphia.

In witness whereof, the applicant has hereunto subscribed h— name. Dated this 18th day of Dec., 1877.

Signature of the person applying for insurance. Write the name in full. } C. S. ALFORD.

Witness present—
CHARLIE SHAW.

Persons making an insurance on the life of another must sign the following:

I do hereby certify, that I have an interest in the life of the above named —— ——, to the full amount of the sum mentioned to be insured, and I hereby unite with him in the foregoing application, statements, and covenants.

Sign the name in full.

Witness present.

NOTICE.—The full names of all parties must be written plainly and distinctly. Christian names must not be abbreviated. Every question must be fully answered.

161½ *Certificate.*

To be filled up and signed for the benefit of the applicant, and at his own cost, by his family physician, when required by the medical director of the company.

1. How long have you been the physi-an of the party whose life is proposed for insurance in the foregoing application? Probably 10 years.

2. A. Have you attended h— frequently? A. Occasionally.

B. For what complaint and how long since have you prescribed for h—? B. Some slight ailments, & once for diabetes.

3. A. Do you know h— to be temperate? A. Yes.

B. Is he regular and correct in h— habits? B. Yes.

4. Do you believe h— liable to any hereditary disease? If so, state the disease. No.

5. Has he at any time been affected with delirium tremens or other result of intemperance; with insanity, apoplexy, palsy, convulsions, or other derangement of the brain and nervous system? Has he had any sudden seizures of any kind, or do you consider h— liable to such? No.

6. A. Has he ever been affected with any disease of the lungs, heart, throat, liver, kidneys, alimentary canal, large blood vessels, or other important organs; or with gout, hernia, or any other disorder that either is dangerous or may become so, or may leave the general health in a precarious condition? If so, what disease or diseases? A. Kidneys only, and that is cured.

B. If ruptured, name the kind of hernia. B. No.

C. Is he protected by a truss? C. ——.

7. Are you aware of any peculiarities or particular circumstances in his general health, mode of life, or occupation, or of any previous injury not alluded to above, that may tend to shorten life, or render its duration more than usually uncertain? No.

8. When did you last see the above named. Yesterday.

9. Please state any facts of importance in regard to the physical condition and history of the applicant not included in the foregoing answers.

Date of certificate — I attended him for diabetes 2 years ago. I have examined his urine for sugar repeatedly since that time and have never found a trace of sugar, notwithstanding the fact that he has made no restriction in his diet.

The signature. F. V. L. BROKAW, M. D.

Agents are requested to give specific answers to every one of these questions, and if they have anything else to state in regard to the risk, they must communicate it in writing to the office when the application is forwarded.

1. Have you seen the person whose life is proposed to be insured on this application? Yes.

2. Do you believe that he is the same person who appeared before the medical examiner? Yes.

3. A. How long have you known him? A. 8 to 10 years.

B. Are you personally acquainted with him? B. Yes.

4. Have you ever known or heard of his being indisposed? If so, with what disease or injury? Only as stated in application.

5. Is he at this time, to the best of your knowledge, in sound health? Yes.

6. A. Are his habits and manner of living regular, correct, and temperate? A. I think so.

162 B. Have they always been so? B. I think so.

7. Is he thin, middle sized, robust, or bloated? Robust.

8. State any defect there may be in his person? None.

9. Do his manners, conversation or appearance indicate ill health or feeble constitution? No.

10. Do you consider him in all respects a proper person to be insured, and do you recommend him as such? Yes.

The answers are considered strictly confidential, and are not to be shown to the applicant.

Dated 18th Dec., 1877.

Signature. CHARLIE SHAW.

(If the above certificate be filled by a solicitor, the following should be signed by the agent. I hereby indorse the above certificate, and hold myself responsible for the correctness thereof.)

Dated at ——, 18—.

(Signed) —— ——, *Agent.*

Payment of premiums.—The rate of premium to be charged upon any policy will always be that corresponding to the age of the insured at the date of the policy, and a policy cannot be written to bear date prior to the first day of the calendar month in which it is issued. The date of payment of premium cannot be changed after a policy has been issued, and the amount insured can only be increased by the issue of a new policy. Changes in the manner of paying premiums (as from yearly to half-yearly or quarterly, or the reverse) can only be made at the end of a policy year; and when such a change is desired a written request for the same must be signed by the policy-holder on blanks furnished by the company, and the policy itself must be forwarded to the home office of the company for the proper indorsement.

Beneficiaries.—In every case the name of the payee or beneficiary of a policy must be distinctly given. Thus a policy cannot be written payable to "wife" or "children" unless their individual names are given. A policy, however, may be written payable to

any given person as trustee for the wife or children, in which case the trustee will collect the policy when it becomes a claim, and will have the responsibility of distributing the money. A wife may in this way be made trustee for herself and her children. Also a policy cannot be written payable to "heirs," unless their names are given; but can, of course, be written payable to executor, administrator, or assigns of the insured; that is, to his estate.

Assignments.—A change of interest in a policy, or a surrender of the same, cannot be made without the written transfer of all parties in interest, including the beneficiaries under the policy. All assignments must be executed on proper forms, and sent, accompanied by the policy, to the home office for approval and record; and under no circumstances will the company assume any responsibility for the validity of an assignment. If any claim be made under an assignment, proof as to the extent of insurable interest may be required.

Extra rates.—Permits are required for travel or residence beyond the limits assigned in the policy, and for hazardous occupation; for which application must be made to the home office. Extra rates in such cases are always charged as a percentage on the amount insured, and not on the amount of premium. An extra rate of ½ of 1 per cent. is charged on the lives of females under the age of 48, if insured on ordinary life or joint-life policies. On limited payment or endowment policies the charge will be increased.

Receipts for premiums to be valid must be issued from the home office, and signed by the president or secretary.

163 *Deposition of Wm. Hill.*

WILLIAM L. HILL, recalled for the defendant, testified as follows:

Direct examination by Mr. JUDSON:

Q. You are engaged in the insurance business, are you not?

A. Yes, sir.

Q. Do you know what a fifteen-year endowment policy is?

A. Yes, sir; very well; it is a policy on which the premiums are paid for fifteen years, when it becomes a claim against the company, if it does not become a claim previously by death; in other words, it is a contract by which the company agrees to pay the amount of the policy at the end of fifteen years, and if the party dies previously it is paid like any other claim.

Q. Do you know how the rate of premiums upon such policies compare with those upon life policies?

A. The rate of premiums is between three and four times as large as on the ordinary life policy, depending upon the age of the person.

Q. State if you know whether this class of policies is the same in different companies as to the rate of premium?

164 A. It is.

Q. You may state as to the insurability of different parties, whether a party may or may not be insurable for the one class of risks and not for the other?

A. There are a great many cases where all companies will insure a man on an endowment policy when they will not insure him on the ordinary life plan.

Q. State why?

A. Because they are willing to take the risk for ten or fifteen years, but they are not willing to take it for life; the risk ceases, of course, after the endowment is paid; that is, the company is released, and companies are willing to assume the liability for that length of time, but not beyond it.

Q. In other words, on the endowment plan for a definite time with the compensation paid, companies are willing to carry a class of risks that they would not otherwise carry. Is that your meaning?

A. Yes, sir; that they would not carry on the ordinary life plan.

Cross-examination by Mr. REYNOLDS:

Q. That is your explanation of the difference between a life and an endowment policy?

A. Yes, sir.

165 Q. Is that the way that the New York Life Insurance Company scales its rates between life and endowment policies?

A. I don't know what you mean by scaling its rates.

Q. That it puts its good risks on its life plan, and its scaly risks on its endowment plan?

A. It depends on what the man applied for.

Q. Do you make a difference between an insurable and a non-insurable man, as to whether you give an endowment or life policy?

A. We cannot make a man take a life policy.

Q. Do you bring that into your schedule, and in preparing the rates by which you fix your payment of the premiums?

A. That has nothing to do with the rates.

Q. Do you mean to say that what you have stated on your direct examination is the difference between life and endowment policy?

A. Certainly.

Q. Don't you know the difference which all companies make, that pretend to conduct business on a sound basis, is, that the difference between an endowment and a life policy is the difference of

166 the premium charged with regard to the time the policy is to mature?

A. That is the reason which makes it better for a company to take a risk on an endowment than on an ordinary life policy.

Q. Don't you know that the scale upon which the premiums for endowment policies are determined is, that the increased amount of premium is supposed to equalize the difference between it and the lesser premium if the man lives out his expectation on the ordinary life plan? Don't you make the difference between them merely depend on the size of the premiums?

A. That is a little mixed. I don't get your idea.

Q. I mean to say this: When an endowment policy matures you have to pay the whole amount of it?

A. Yes, sir

Q. And you are compensated for paying it earlier than you would have to pay it on a life policy by the increased premium you are paid?

A. Yes, sir.

Q. And the risk has nothing to do with it, has it?

A. Yes, sir.

Q. Where has it anything to do with it?

A. Just exactly as I stated a moment ago. Risks that we are willing to assume for fifteen years we are not willing to
167 assume for life; if a man's family record indicates that he belongs to a short-lived family, a company will insure him on the ten or fifteen-year endowment plan, but not on the ordinary life plan; that is so not only in the New York Life Insurance Company but every other company.

Q. Do you not pay the man who takes an endowment policy the whole amount of the policy at the end of fifteen years if he survives?

A. Yes, sir.

Q. Then where is the difference?

A. The difference is that we have only got him insured for fifteen years.

Q. But if he lives fifteen years you have to pay it all?

A. That is all true, but we have the increased premium that he has paid over a life policy.

Q. Suppose he dies within the fifteen years?

A. Then we have been compensated by the larger premium. If from the man's family record we think he will live fifteen years we are willing to assume the risk for fifteen years.

Q. What is the expectation of a man thirty-five years old?

A. I have no idea.

168 Q. Are you an expert in that business?

A. No, sir; I am an insurance agent.

Redirect examination by Mr. JUDSON:

Q. What do you mean by saying that you are not an insurance expert?

A. I am not an actuary.

Q. You mean to say that you do not carry in your head the tables of mortality?

A. Yes, sir.

Q. But you are familiar with the insurance business?

A. I am perfectly so. I have been in it for a great many of years.

Q. There are definite tables of mortality mathematically calculated, are there not?

[A.] Yes, sir.

Q. Are they not the same in all the insurance companies in the United States?

A. There are two tables, I believe they are called the American and actuary's table of mortality.

This was all the testimony introduced on the part of the defendant.

169 *Rebuttal.*

The plaintiff to further sustain the issues on his part offered evidence as follows:

Deposition of Chas. H. Hughes.

CHARLES H. HUGHES, sworn for the plaintiff, testified as follows:

Direct examination by Mr. REYNOLDS:

Q. Where do you reside and what is your occupation?
A. I reside in St. Louis and am a physician.
Q. How long have you been engaged in that profession?
A. 22 years.
Q. Where you acquainted with Mr. Alford in his life time?
A. Yes, sir.
Q. Do you know anything about his health or his habits?
A. I had not seen him lately. I knew him during the war and a short time after the war, but only met him casually since.
Q. Are you, as a physician, acquainted with a disease called diabetes?
A. Yes, sir.
Q. What varieties of the disease are they?
A. Strictly speaking diabetes is not a disease at all, it is a symptomatic or functional expression of disease; there are two varieties of that kind of trouble, one is the form of diabetes in
170 which the urine is simply increased in quantity, that is called the insipid or tasteless diabetes—*diabetes insipidus*—because it is tasteless, because it is devoid of sugar; the other is called *diabetes mellitus*, because it contains sugar; that is, a glucose, which is the equivalent of sugar.
Q. As to the first form, *diabetes insipidus* is that a fatal or serious disease?
A. *Diabetes insipidus* is not so serious an affection as *diabetes mellitus; diabetes insipidus* may last a long time, and a person may recover from it spontaneously.
Q. What will produce recovery of that form of the disease?
A. Salutary changes in the surroundings of the individual, a cessation of those strains of the system which produce it, and removal from the ordinary causes which excite it, proper temperature, &c.; *diabetes mellitus* sometimes recovers spontaneously, too; whenever it does recover it recovers spontaneously; there are no remedies which cure it.
Q. What are the producing causes of the disease called diabetes?
A. The causes of *diabetes mellitus* are very numerous;
171 anything which disturbs the natural or normal innervation of the liver will produce a failure in the function of the liver which is to secrete the sugar—what we call in medical language the glucontomic, or gluten-forming function of the liver—anything which disturbs that will produce an extent of sugar in the circulation which it is the function of the kidneys to throw off; the kidneys are

the eliminating or secreting and excreting organs; they throw off the sugar whenever it is in excess.

Diabetes, strictly speaking, is not a disease of the kidneys; in fact, it is not a disease of the kidneys at all; it has been conjectured to be a disease of the liver, from the fact that an injury of the liver may produce it, and that an artificial congestion of the liver produced in animals has developed *diabetes mellitus*, but injuries of other parts of the system, a stoppage in the dark-blood circulation of the abdominal cavity, will develop what is called "glycosuria," and that sugar in the urine has to be thrown off by the kidneys; that is the philosophy of diabetes; so that anything which
172 will disturb the innervation, that is, the normal nerve supply of the liver which presides over its functions, will develop diabetes, either transient or permanent; an injury of the head, an injury of the base of the brain, has been known to produce it; it has been produced artificially in animals by puncturing the base of the brain, or by injuring the back of the brain, the upper part of the spinal cord, what we call the *medulla oblongata*—that portion of the spinal cord which lies within the cranium—an injury to that will develop diabetes; sometimes it has been done artificially, as I say, in animals; drunken-ess will also do it, and excessive mental strain or prolonged business strain; anything that produces profound exhaustion of the nervous system will develop sugar, will interfere with the sugar-forming function of the liver, and it will show itself in extensive sugar in the urine.

Q. From that is it a permanent or transitory disease?

A. Sometimes *diabetes mellitus* is a permanent disease and a very grave one, at other times it is a disease of little significance; sometimes *diabetes mellitus* seems to have its origin directly
173 in the liver, and to implicate the kidneys in structural change; at other times and more frequently the kidneys are not at all effected, and in other conditions the liver is only secondarily implicated.

Q. Is it the result of other diseases, or is it a direct disease itself?

A. As I said the exact locality of *diabetes mellitus* is not definitely settled in medicine, it is one of those questions which is similar to some of your questions which you say are *sub judice*—it is not a settled question; the precise and definite origin of *diabetes mellitus* has not been ascertained to the satisfaction of the best investigating minds in medicine; of one thing, however, the profession is well assured, and that is, it is not a disease of the kidneys primarily.

Q. There is no question about that?

A. No, sir.

Q. That was the old doctrine?

A. That was the former supposition, because the function of the kidneys being to secrete the urine it was supposed that if the
174 kidneys secreted sugar in the urine they must have been its fault primarily, which is not the case.

Q. Can you say whether it is a curable or incurable disease?

A. That depends altogether upon the causes of the trouble; *dia-*

betes mellitus is curable, I believe; I have seen what I considered to be satisfactory evidences of its curability.

Q. What would be the signs of that; how would you tell whether it had been cured?

A. When a person has diabetes he becomes emaciated, he loses flesh, and a chemical test reveals sugar in the urine; you can taste it. I know some medical men who actually do taste urine, and when a man recovers from diabetes the chemical test shows its absence; the man begins to regain flesh; there is a sense of weariness, a peculiar feeling of exhaustion, and a feeling of inability to discharge one of the accustomed daily duties connected with *diabetes mellitus;* there is a loss of sexual appetite and instinct; a
175 man's wife is very apt to discover whether her husband has diabetes, or if he has had it long. When a man recovers from diabetes those symptoms disappear.

Q. If he had children [when] he was supposed to have that disease would that be pretty good evidence that he was well of it?

A. That is another question that is *sub judice* in medicine.

Q. If a man got married after he was supposed to have had it and had children the supposition would be that he had got over it, would it not?

A. No, sir; I would not say that; that is going beyond the limits of strict scientific fact. I don't mean to say that a man who has diabetes becomes impotent, I mean that his sexual appetite fails. I don't think there have been any satisfactory investigations on that subject to settle that question beyond a doubt. I think in the advanced stages of diabetes, when a man is about approaching his end, that then he would become impotent, because there are other evidences of the failure of the system along with it, but the re-
176 covery is shown by an absence of the usual symptoms, and that recovery generally takes place spontaneously from his surroundings and the inherent vitality in his system.

Q. If the disease had disappeared spontaneously in a person, what would be the natural conclusion to be drawn from that?

A. The natural conclusion would be that such a man was recovered, from the fact that there are no remedies which have any specific influence over diabetes; consequently if the symptom disappeared it would have to be as the result of inherent vital influences at work in the organism. A man's own normal vitality would have to be required before those symptomatic symptoms would be relieved; his mental and physical vigor would recover to him, and he would regain his normal flesh and weight.

Q. Is it likely that a who has had the symptoms of the disease, say, in 1875, and who, without taking medicine, was apparently cured in 1877, or if he had taken medicine (because you say no medicine can affect it), apparently recovered in 1877, and did not die until September, 1880?

177 A. I would like to be understood about no medicine curing diabetes; I mean that medicines have no direct influence over that disease or that condition; you can improve the tone of the system by medicine the same as you can by electricity and other

things; I do not mean to say that nothing can be done for a man who has diabetes.

Q. Is it likely that the man, under those circumstances, had the disease in him all that time, from 1875 to 1880, without it making itself apparent?

A. I don't believe that diabetes could remain latent for five years; I should consider that a man who is free from all the symptoms of diabetes for five years, or three years, and who is able to discharge his ordinary duties in life with his accustomed and usual vigor, is free from the disease.

Q. And if he afterwards was attacked by it, and died within a month of the time of the attack, what would you say about that—as to the date of the origin of the disease from which he died?

178 A. I should, from my way of viewing that trouble, call that a recurrence of the disorder.

Q. Would it have any connection with the previous attack necessarily?

A. Well, yes, in this sense: A man who has had a disease of any kind at one time in his life is not likely to be so strong, perhaps, as if he had never been affected by it, but that is not an invariable rule.

Q. Can the presence of this disease be determined by a superficial examination or by questioning the applicant for insurance?

A. I would like to answer that question about latency, because I do not want to be misunderstood; I expect these things to be brought up to me some time or other, for I am often in court, and I do not want to make any mistake or be misunderstood, or give half an answer. We all have our tendency to disease; in one sense of the term it may be said that all men have their latent tendency to disease; in that sense you may say that a man who had diabetes has a latent tendency to it; some men have a latent tendency to consumption; some men have a latent tendency to rheumatism,

179 some men have a latent tendency to heart disease, but that is not peculiar to all mankind. You may take a hundred men and put them in military service in the field, expose them to the same surrounding circumstances which constitute what are called the exciting or developing causes of disease, and one man will fall sick of pneumonia or lung fever, another will fall sick of rheumatism, another will fall sick of a bronchial affection; one will be attacked in his kidneys, another in his legs, and another in his heart; that is what is called in medicine the latent tendency that all mankind have to diseases. We are all made up of a great many congenital factors, and we get these inherent tendencies from our ancestors. I should answer your question in this way: If a man had had diabetes at one time in his life and remained cured of it for five years and then had it I should consider that a second attack and not a continuation of the first, although it might be said that the first attack more or less predisposed the second.

180 Q. I will return to the question that I asked you a while ago. Is it likely that a physician can determine from an examination and from questioning the party the presence of diabetes, assuming that [it] is not in its advanced stage?

A. In the forming of diagnoses in our profession we have what are called "reasonable presumptions," as you do in your profession, I suppose; it is a reasonable presumption if a man appears to possess his ordinary weight, if he has the ordinary appearance of flesh, if the face has its accustomed expression of vitality and nerve rest, that he is well, and you would not expect diabetes to exist under those circumstances, and taking the general averages and the ordinary symptomology of the disease you might reasonably conclude that a man who looked well and possessed his ordinary mental vivacity and his ordinary weight and flesh was free from *diabetes mellitus*

Q. A man might think so himself, too?

A. Yes, sir; a man would not be very apt, if he was not a professional man, to conclude that he had *diabetes mellitus*
181 under those circumstances.

Q. And he might have it in his system and answer that he did not have it without knowing anything about it?

A. I don't know anything about that; that has nothing to do with me.

Cross-examination by Mr. Overall.

Q. Can you say that this disease is sometimes in abeyance?

A. No, sir; I have not said that.

Q. Is it not sometimes in abeyance; that is, does it not exhibit itself at one time and then apparently pass away to recur again, being in the meantime in abeyance?

A. The manner in which I have considered that question is this: I have said that after a pronounced recovery from diabetes I would not consider that disease to be in abeyance when a man is attending to his ordinary avocation, because he could not do so if he had diabetes.

Q. You said that a man sometimes has diabetes when a physician, by looking at him, would not know that fact, then is it
182 not somewhat in abeyance at that time?

A. That depends on the understanding of terms. If you mean by abeyance that the disease exists, I would say not, because the only evidence of the existence of the disease is progressive emaciation, progressive loss of flesh, a chemical test of the urine, and *malaise*, a sense of being unequal to the usual duties of life.

Q. Well, there are recurrences of the disease?

A. I have said so, just like all other affections. I should consider a man well if he were so pronounced by any one competent to examine him, who was familiar with the symptoms.

Q. But a person who has once had diabetes is more likely to have it a second time than a person who has never had it?

A. As I have said, it obeys the law of all other diseases. An assault once made upon the system more or less compromises the organs, sometimes very little, sometimes a good deal.

Q. But it is more apt to recur to a person who has had that
183 organ affected, than to one who has never had it affected?

A. I have explained that. I say we all have our latent

tendencies to disease; if a man has a tendency to diabetes, and has it once, he will likely have it again if the circumstances are favorable for it. Some men have diabetes every time they are exposed to cold. There are some old men who have diabetes, beginning at about sixty years of age, and it lasts ten or fifteen years, until they die, without much inconvenience.

Q. Which of the two forms of disease do you say is the more serious?

A. *Diabetes mellitus* is usually considered the more serious?

Q. How about the other one, is it a serious matter or not?

A. Yes, sir; I would not like to have it.

Q. They are both serious diseases?

A. They are serious according to the degree of morbid implication.

Q. I am not talking about any one person who might have had the one or the other, I am speaking of it generally; are they not both generally considered as serious diseases and so regarded by physicians?

184 A. If you do not mean by that fatal diseases——

Q. I don't mean fatal. I say they are considered by physicians as serious diseases.

A. But I want the terms understood.

Q. I do not mean necessarily fatal. You say you would not like to have either of them?

A. No; nor any other disease.

Q. But are they considered serious?

A. *Diabetes mellitus* is considered the more serious; *diabetes insipidus* is very often not a very great trouble; it depends altogether upon the gravity of the cause, as I have explained before. You may have *diabetes mellitus* and *diabetes insipidus* from nervous exhaustion, and you may recover from that nervous exhaustion, and the irritable state of the nervous system, upon which that diabetes depends, may become tranquilized, regain its normal tone, and the disease, which is but a symptomatic or functional expression of that trouble, may pass away. Some lawyers have *niabetes insipidus* when they have a case of great consequence, and sometimes witnesses, when confronted with legal talent of a high order, will

185 get the affection too. I don't mean anything personal.

Q. You are not affected with it now, doctor?

A. No, sir.

Deposition of S. M. Pearman.

S. M. Pearman, sworn for the plaintiff, testified as follows:

Direct examination by Mr. Reynolds:

Q. Were you acquainted with Chinonda S. Alford in his lifetime?

A. Yes, sir.

Q. How intimately were you acquainted with him?

A. I was employed continuously by him for five or six years just prior to his death.

Q. Were you in his employ in 1877?

A. Yes, sir.

Q. When were you first in the employ of Mr. Alford.

A. I think it was sometime in the latter part of 1874 or the early part of 1875.

Q. What was the condition of his health at that time?

Defendant's counsel objects to the question as irrelevant and having no bearing on the case. Objection overruled. Defendant excepted at the time.

186 A. He looked a perfect picture of health, and did up to a few months before he died; he always looked that way; he had a very ruddy complexion; he was very red in the face, and a perfect picture of health I considered him.

Q. Did you know that he had been sick before that time?

A. Yes, sir.

Q. After you were with him, was he sick after 1874?

A. He took medicine, and I understood that he considered there was something the matter with his kidneys.

Q. Do you remember the time of his making application to the New York Life Insurance Company for this policy?

A. Yes, sir.

Q. Were you present at the time?

A. Yes, sir; at the time the application was made out and at the times the solicitor came in—four or five times.

Q. When the solicitor came for him to make out the policy, and on the day that the application was made out, you were there?

A. Yes, sir.

Q. Did you hear the question as to whether he had had disease of the liver and kidneys, or as to who his medical attendant
187 was, if any, asked Mr. Alford on that occasion by Mr. Roeslein, and did you hear Alford's answer thereto?

A. Yes, sir; I heard it.

Q. Please state what he said in reply to those questions.

Defendant's counsel objects to the question, on the ground that under the contract between the parties the application is the basis of the contract, and any facts not disclosed in the application were by express contract between the parties to be in writing, and no evidence is admissible in regard to them unless presented in that form; also as incompetent and irrelevant. Objection overruled. Defendant excepted at the time.

A. I could not give the specific words that were used. I remember in one part of the conversation that Mr. Alford stood up at the time this question was asked and pointed out through the window and said: "My medical examiner has his office across the way, you can go there and find out from him. I have been affected in the kidneys, but he says I am well now, and I feel well."

188 Q. Did he say who that physician was?

A. Yes, sir; he said Dr. Brokaw, and his sign was quite prominent. Mr. Alford's place was right across the street front from Dr. Brokaw's office. Mr. Alford's office was on the southwest corner

of Fourth and Market streets, and Dr. Brokaw's office was on the southeast corner.

Q. Who was present on that occasion when he made that remark?

A. I think there were three gentlemen present; I know there were two; I know that Mr. Roeslein was there, and this doctor that wore glasses, and I think there was one other; I would not recognize him if I were to see him, and I am not positive that there were three there, but I know there were two, and that they sat at opposite desks.

Q. Where were you with respect to that desk?

A. Mr. Alford's desk and mine were against each other. I was standing by my desk and could see Mr. Alford's desk; the desks were back to back.

Q. Had you seen Mr. Roselein in there before on this business?

189 A. Yes, sir; four or five times.

Q. Can you state whether or not he and Mr. Alford had any conversation before that time as to Alford's physical condition and previous state of health?

Defendant's counsel objects to the question as incompetent and irrelevant. Objection overruled. Defendant excepted at the time.

A. Yes, sir; they had.

Q. State when that conversation occurred and what it was.

Same objection and ruling. Defendant excepted at the time.

A. Just prior to the time this application was made out I heard Mr. Alford at one time say to Mr. Roselein, "Your company ought not to insure me; you know I have been affected with kidney disease."

Q. What did Roselein say in reply to that?

A. I heard him say on one occasion, I am not positive whether it was on that occasion, "Just give me your application and I will see if I cannot get it through." He was over solicitous for it, and Mr. Alford hesitated about giving it.

190 Q. On that occasion of his being there with this application, did he read the answer over to Mr. Alford as he had given it?

Defendant's counsel objects to the question as incompetent and irrelevant. Objection overruled. Defendant excepted at the time.

A. No, sir; I don't think the paper was read over to him; I did not hear it read over to him.

Q. Can you state what was read over to him before he signed?

A. I did not hear anything read over to him.

Q. You heard questions propounded and answered?

A. I don't remember what questions. I remember questions being asked him, and his standing up and pointing to the doctor's office. I would not have known that that specific question was asked, if it had not been for his standing up and pointing across the street to the doctor's office; that attracted my attention, so that I

knew that they were there, and what business they were there for.

191 Q. Have you any interest whatever in this case?

A. Not a particle.

Q. What business are you in now?

A. The wholesale lumber and commission business?

Q. Are you in business with yourself?

A. It is the Pearman Lumber Company, a corporation; but it is about all mine.

Q. Are you in any way connected with Mr. Alford or interested in his estate?

A. Not a particle.

Q. Do you know who collected the three annual premiums from him that were paid on the policy?

Defendant's counsel objects to the question as having no bearing on the issues involved in this case. Objection overruled. Defendant excepts.

A. I do not know who collected them all. I know Mr. Roeslein collected one, for I was in the office when he did it.

Cross-examination by Mr. JUDSON:

Q. How near were you sitting to Mr. Alford at this time?

A. I was standing; the backs of our desks were right to-
192 gether; we were not more than three feet apart; they were facing north and I was facing south; I was standing at the corner of my desk and they were sitting at the corner of his desk.

Q. Did you see them all?

A. Yes, sir. I think there were only two sitting around the desk besides Mr. Alford.

Q. Is the signature to this paper in Mr. Alford's handwriting? (handing the application to the New York Life Insurance Company to the witness.)

A. I should say it was.

Q. Is the signature on the back of it in his handwriting?

A. I think so; it resembles it.

Q. Do you know what the agent wrote down?

A. No, sir; I do not.

Q. Did you hear any more of the conversation between the parties than you have narrated?

A. Yes, sir. I don't remember specifically what it was, but I was there where I could hear it all.

Q. Do you recall any of the other conversation?

A. No, sir; I don't think I do. That was a question that interested me; I did not suppose he would get his policy.

Q. Why not?

193 A. Because he told Roeslein that he had been affected with kidney disease, and I thought the company would not want a risk like that.

Q. You knew at the time that he had had kidney disease?

A. Yes, sir; and everybody else that knew him did.

Q. You knew that he had a medical attendant?
A. A long time prior to that he said he had one.
Q. I didn't ask you that.
A. Well, I knew it from that fact.
Q. Did you know it aside from anything that was said there?
A. Yes, sir.
Q. How long were the parties at the desk about this application?
A. I should say they were in the office fifteen or twenty minutes; something like that; it might have been half an hour.
Q. Did your hear Mr. Alford say anything as Roeslein went away?
A. Not that I could recall.
Q. Who was it had the conversation with Alford, Roeslein or the other man?

A. The doctor; the gentleman with the glasses on, I think;
194 he was sitting at the desk there, if my recollection is correct, with a pen—the doctor.

Q. You mean that the other party who was there with Roselein at the time this application was made was a doctor?
A. I think he was; I think it was the same doctor.
Q. You mean Dr. Baumgarten?
A. I think so.
Q. You were examined in this case before, were you not?
A. Yes, sir.
Q. Do you not remember that the other party present with Mr. Roselein was a party named Englehorn?
A. I don't know Mr. Englehorn.
Q. Were you introduced to the party?
A. No, sir, I was not; I knew Mr. Roeslein very well; I did not know the others.
Q. Do you remember the gentleman whose name is signed there as a witness, Mr. Englehorn?
A. No, sir; but he may have been there; I think there were three there; I think there were two besides Mr. Alford; there may have been three, but my recollection is that there were Roeslein and one other.

195 Q. Don't you remember that Dr. Baumgarten came there on the following day, the ninth of December?

A. Yes, sir; I remember when he came there; he came there and examined him. Since my attention has been called to it, the doctor was not there the first day.
Q. You were incorrect, then, in stating that he was?
A. I was not positive, but I recollect now that he was not there.
Q. The doctor was there alone with him the next day, was he not?
A. No, sir; I think not; I think there was somebody with him; I don't remember whether it was Roeslein or not, and I am not positive that there was anybody with him.
Q. But there was somebody with Roeslein on the first day?
A. Yes.
Q. Did you see Mr. Alford when he signed his name to that paper?
A. No, sir; I did not see him sign it.

Q. Did you hear him say that he had signed it?
A. No, sir.
Q. Did they sit together at the table?
A. Yes, sir; the party writing was in the center and the
196 others on the outer side—the west side—if I remember correctly.
Q. Where was Mr. Alford sitting?
A. He was sitting near the end of his desk.
Q. Along side of the gentlemen that was writing?
A. I think pretty nearly back of him, if I remember correctly; my recollection about that is not very distinct; I know they were clustered about the desk—all that were there.
Q. Do you remember when this policy was received by Mr. Alford?
A. No. sir; I cannot remember definitely; I think Mr. Warner got a policy about that time, and I could not distinguish between the one and the other.
Q. Did Mr. Alford say anything about it after the application had been sent in?
A. Not that I heard of.
Q. Did he ever make any allusion to the subject?
A. I don't know that he ever did.
Q. Did you have a conversation with him?
A. No, sir; I might have made a statement to him.
Q. Did you not make some passing remark to him as to
197 whether he would get his insurance or not?
A. Perhaps I did.
Q. How did he express himself?
A. He said that Roeslein knew what he was doing.
Q. Did he say anything else about it?
A. No, sir; not that I remember.
Q. Did he say why Roeslein understood what he was doing?
A. I don't remember what he said. I expressed myself as being surprised that Alford had gotten it, and he did not seem to be surprised; he said that Roeslein would take him even if he had the disease.
Q. That was when the policy came?
A. Or after; it might have been a few days afterwards; I think it was about the day it came; I don't think the matter was ever alluded to after two or three days after it came.
Q. Do you remember when the policy came in the Penn Mutual Insurance Company?
A. I remember about the time he got it; I don't remember when it came into the office.
Q. Do you remember which policy came first?
A. No, sir; I do not.
198 Q. Do you remember any trouble about getting the other policy?
A. No, sir.
Q. Do you know anything about that?
A. I saw Charlie Shaw in the office pretty often.

Q. Do you know about changing his form of application to a different kind of policy?

A. No, sir.

Q. Did you hear anything said about that?

A. No, sir.

Q. Did he ever say anything about the amount of premium he had to pay for the other policy in the Penn Mutual?

A. No, sir; I understood he had five thousand dollars there, but what he paid on it I don't know.

Q. Did you see the policy of the New York Life when it came to the office?

A. I cannot remember definitely about that; I think I was there when it was handed to him; I never saw the inside of it—I know that.

Q. Do you remember anything that was said between the parties on this occasion when the application was signed other than what you have testified to?

A. Nothing that I can call to mind.

Q. Did Mr. Alford express any doubt about the company
199 accepting him on that occasion?

A. I don't think he did—not that I heard of.

Q. Did he say he did not think the company would take him?

A. No, sir; he told Roeslein that when he first applied for the privilege of writing out the policy.

Q. You don't remember of anything being said of that sort on that occasion?

A. I don't think there was anything of that kind said then.

Q. Did Mr. Alford express himself as fearful whether any policy would be issued?

A. No, sir; no such expression as that.

Q. Did he not make use of such an expression as that afterwards?

A. He did a year after; he did not want to pay his premium to Roeslein.

Q. Why didn't he want to pay his premium to Roeslein?

A. He said he did not care about keeping up the insurance; I don't know but he expressed himself that the company would contest the matter; Mr. Warner had had some experience with them before.

Q. No matter about that.

200 A. Well, I know that Mr. Roselein had to urge him to pay either his first or second premium, and Mr. Alford did not want to do it.

Q. Did he say why?

A. Mr. Alford was apprehensive of something.

Q. What did Mr. Alford apprehend?

A. He apprehended that there would be some trouble, I reckon.

Q. Did Mr. Alford apprehend that there would be trouble about his having had this kidney disease?

A. I cannot tell his mind.

Q. Well, you say that Mr. Alford was apprehensive about this matter about a year afterwards, and dispo-ed to let it drop?

A. I say, I suppose so; I don't know that he was.

Q. Didn't you start to testify that he was?

A. No, sir; he objected to paying the premiums, and he was a man of means.

Q. Did you not testify on the other trial of this case that he was very fearful about this thing?

A. I don't recollect having testified about that. I might have; I might have said I thought he was; I did not know that he was.

201 Q. When you say that he was apprehensive or fearful, what do you mean by that?

A. I said that I thought he was; that was my conjecture, simply; that he might think there might be something the matter with the policy, but I did not know his mind.

Q. Did he ever talk to you about it?

A. He never expressed himself that way to me.

Q. Did you ever talk with him about the matter?

A. I never did, except I might have said to him, "I am surprised you got the policy," and he never said anything to me about it.

Q. Did you make such a remark as that to him after the policy came?

A. I think I did, sir.

Q. You told him you were surprised that he got the policy on account of his having had kidney disease?

A. Because he answered the question, "Yes," I did not suppose they would give him one.

Q. Did he make any answer to you when you expressed your surprise?

A. No, sir; not that I know of, except what I said, that he

202 guessed it was all right, the insurance business.

Redirect examination by Mr. REYNOLDS:

Q. I understand you to say that the reason you asked him about it was that you had heard him answer the question about his kidney disease, "Yes," and were surprised that the company gave him a policy?

A. Yes, sir.

Deposition of E. A. Warner.

E. A. WARNER, sworn for the plaintiff, testified as follows:

Direct examination by Mr. REYNOLDS:

Q. Were you present the day this application of Mr. Alford's was made to the New York Life Insurance Company?

A. I think I was, sir.

Q. Did you hear the questions asked him by the agent?

A. I heard the conversation, but I was busy at the time and could not recall any of the express words.

Q. How often had you seen Mr. Roeslein in the office?

A. A number of times.

203 Defendant's counsel objects to this testimony, as incompetent and irrelevant. Objection overruled. Defendant excepted at the time.

Q. What were you doing in the office at that time?

A. I was writing; I was a partner of Mr. Alford's.

Q. Did you hear any conversation on those previous occasions between Alford and Roeslein in regard to Mr. Alford's condition of health?

Same objection. Objection overruled. Defendant excepted at the time.

A. Mr. Roeslein wanted to make out an application for Mr. Alford for an insurance policy, and said he would get it, too; that is all he said.

Q. Do you know what Mr. Alford told him about his condition, if anything?

Same objection. Objection overruled. Defendant excepted at the time.

A. Mr. Alford never concealed anything in regard to his condition.

Q. What do you mean by that?

A. He never concealed anything in regard to his health,
204 his having trouble with his kidneys at one time.

Q. Do you remember that Mr. Alford did have some trouble with his kidneys?

A. Yes, sir.

Q. How long before this application was made was that?

A. I should judge about three years before, when I was employed by Mr. Williams and Mr. Alford.

Q. Do you know about Mr. Alford going out of business for a while?

A. Yes, sir.

Q. How long did he stay out of business?

A. Two years.

Q. Was his health restored, apparently, in the meantime?

Same objection and ruling. Defendant excepted at the time.

A. I think it was.

Q. Did he resume his business?

A. He did.

Q. To what extent was he in business after December, 1877?

A. We did quite a heavy business; he was an equal partner; in the first place he was a one-third partner, and he afterwards bought
205 out another partner (there were three of us together); then he had a two-thirds' interest, and we did a business of $200,000 a year.

Q. Was he a very active man in business?

A. Yes, sir.

Q. How long was he sick in his last illness?

A. I don't think it was quite a month; probably three weeks.

Q. Had he been in full active business before that time?
A. Yes, sir.

No cross-examination.

Plaintiff's counsel offers in evidence the envelope heretofore identified, in which the policy sued on was enclosed when it was handed to Mr. Alford by the agent, Mr. Roeslein.

Said envelope had on its back printed words and figures as follows, to wit:

206

New York Life Insurance Company,

William L. Hill, Manager, 417 Pine St., St. Louis.

(Engraved Building.)

346 & 348 Broadway.

On the life of
Chinonda S. Alford.

No. 129,833. $10,000.

Annual premium of $263.80 is payable 22d day of Dec.

First pre'm	$263 80
Policy fee	1
Total	$264 80

From the Insurance Agency of
Ant. Roeslein.
Office: 411 Chestnut St., St. Louis, Mo.

This was all the evidence introduced on the part of the plaintiff.

207

Surrebuttal.

The defendant, to further sustain the issues on its part, offered evidence as follows:

Deposition of William L. Hill.

WILLIAM L. HILL, recalled for defendant, testified as follows:

Direct examination by Mr. JUDSON:

Q. I call your attention to this memorandum endorsed on the policy in suit: "For the information of the assured, and in order that any unintentional errors or omissions which heretofore may be

found to exist may be corrected, an abstract of the application upon which this policy is based may be found on third page within. If corrections are desired, when satisfactory to the company, a certificate to that effect will be issued over the signature of the president or actuary." Was any application made to the company through you for any correction on account of any error contained in this application?

A. No, sir; there was not.

208 Q. Is this memorandum endorsed upon all policies of the company?

A. Yes, sir.

Cross-examination by Mr. REYNOLDS:

Q. That was on it when Mr. Roeslein handed the policy over to Mr. Alford?

A. Yes, sir; it is printed on all our policies in New York.

Q. Is Mr. Roeslein still here?

A. Yes. sir.

Defendant's counsel read in evidence, by consent, the testimony of A. Roeslein, given on the former trial of this case, as follows, to wit:

Direct examination by Mr. Judson:

Q. What is your business?

A. I am in the insurance business.

Q. Were you employed by the New York Life Insurance Company in December, 1877?

A. Yes, sir.

Q. Were you present when this application was signed by Mr. Alford?

A. I was.

Q. State whether or not he informed you at that time that he had had a disease of the kidneys.

209 A. I did not take his application. There was another gentleman with me by the name of Englehorn and he wrote the application; he asked the questions, and I was only along with him without taking the applicant's answers.

Q. Was any of this information given to you then?

A. No, sir; it was given to him. He asked the questions and received the answers and put them down; whether he put them down the way the applicant stated, of course I could not tell.

Q. Did you hear the statement as to his telling you that Dr. Brokaw knew about it and he was his physician?

A. I did not hear that; I was not in the court-room at that time; I just heard the name mentioned.

Q. On that occasion did Mr. Alford tell you that Dr. Brokaw was his physician?

A. Not that I remember of.

Cross-examination by Mr. REYNOLDS:

Q. You were the agent of that company at that time?

A. Yes, sir.

Q. Had not you been in to see Mr. Alford a good many
210 times about that policy?

A. Yes, sir; I was there several times before.

Q. Soliciting him to take the policy?

A. Yes, sir.

Q. How long had you known him?

A. That is more than I can tell; it might be a year before that, before December, 1877.

Q. Who delivered him that policy?

A. That is more than I can remember now. It might be that Englehorn delivered it, because he wrote the application, and it might be that I delivered it; I don't remember which.

Q. You had known him about a year before this policy was taken out?

A. Yes, sir.

Q. Didn't you board at his mother-in-law's, Mrs. Breeds?

A. No, sir. I knew him, as my attention was called to him, being insured. I never boarded here in St. Louis.

By Mr. JUDSON: Q. Is Mr. Englehorn in St. Louis now?

A. No, sir; he is in Cincinnati.

By the COURT:

211 Q. What had Mr. Englehorn to do with this?

A. I used to be the agent of the Life Association and I was out of business for four years; I went out of business three years before the company broke. I was disgusted, and Mr. Englehorn told me that if I wanted to represent a good company I should go with this company; so we came together.

Q. Then you and Mr. Englehorn were associated together as soliciting agents for the company?

A. Yes, sir.

Q. That is the reason you and he went there together. Mr. Englehorn did all the clerical work; he asked the questions and wrote the answers; you were present at the time and saw Mr. Alford sign it, did you?

A. Very likely; I don't remember.

Q. Your memory is very indistinct about that. After it was signed what became of the paper?

A. It was forwarded to the office here, to Mr. Hill, by me.

Q. Your business ended there, did it?

A. Yes, sir. Sometimes he took the application; but I think I took it in this case.

212 Q. Your recollection is, then, that you took this paper over and delivered it to Mr. Hill, the general agent?

A. Yes, sir.

Q. And you had nothing more to do with it?

A. No, sir.

Q. The policy was sent to you to deliver to Mr. Alford, was it?

A. Yes, sir, and I took it, or Mr. Englehorn took it, one or the other.

By Mr. REYNOLDS: Q. Did you not deliver that yourself and collect the premium? Is not that your signature (handing a paper to the witness)?

A. Yes, sir.

By the COURT: Q. Then you delivered the policy sued on?

A. I don't know; that is dated February 1st; the policy might have been delivered by Englehorn two weeks before, because it generally takes a week or ten days to get a policy from New York.

By Mr. REYNOLDS:

Q. You collected the first premium?

A. Yes, sir; but whether I delivered the policy, I don't know; very likely I did; I made out the statement February 1st,
213 but I might have collected it in the middle of the month.

Q. You did not always collect it the moment you delivered the policy?

A. Sometimes not; where the parties are all right I let it go.

Q. Who collected these two renewals (handing paper to witness)?

A. I don't know, but I think I did.

Q. Whose envelope is that (handing envelope to witness)?

A. That is the company's envelope; that is my label on it.

Q. That indicates that it was a policy you had solicited?

A. Yes, sir.

Plaintiff's counsel read in evidence the paper referred to in the examination of this witness, dated St. Louis, February 1st, 1878, being a receipt from Anthony Roeslein to C. S. Alford for a premium of $264.80, due January 14, 1878; and offered in evidence the two receipts for the two other premiums paid by the insured.

Q. This indicates that you were the one who delivered the
214 policy to him or your office here?

A. I could not say that I delivered the policy; sometimes Englehorn delivered the policy; but it is very likely that I delivered it.

This was all the evidence introduced in the case.

Defendant requested the court to instruct the jury as follows:

THOS. C. FLETCHER, Executor, *vs.* NEW YORK LIFE INSURANCE CO.

The court instructs the jury that under the pleadings and testimony in this case plaintiff is not entitled to recover.

Which was by the court refused.

To which refusal defendant then and there duly excepted.

Defendant also requested the court to give the following instruction:

THOS. C. FLETCHER, Executor, *vs.* NEW YORK LIFE INSURANCE CO.

The contract of insurance between the defendant and the
215 plaintiff's testator, Alford, which is evidenced by the policy sued on in this case was in law, by the terms of the contract,

made between said parties at the home office of defendant in the city of New York, on the acceptance at that place by the company of the written application of said Alford forwarded from St. Louis.

The said contract of insurance being thus made between said parties in the State of New York, under the laws of said State, is not subject to the provision of sections 5976 to 5977 of volume 2, Revised Statutes of Missouri.

The question, therefore, in this case is the truth or falsity of the answers in the application alleged to be false by defendant, and if the jury find from the evidence that Alford, plaintiff's testator, had, prior to signing the application read in evidence, a disease of the kidneys, or any serious disease, or had been seriously ill, or had at said time a usual medical attendant, then plaintiff is not entitled to recover.

Which was by the court refused.

To which refusal defendant then and there excepted.

216 Defendant also requested the court to give the following instruction:

THOS. C. FLETCHER, Executor,
vs.
THE NEW YORK LIFE INSURANCE CO.

The court instructs the jury that the contract of insurance, between the defendant and the plaintiff's testator, Alford, which is evidenced by the policy sued on in this case, was made between said parties, at the home office of the company in the city of New York, and the said contract of insurance being thus made between said parties in the State of New York, under the laws of New York, is not subject to the provisions of sections 5976 and 5977 of volume 2, Revised Statutes of Missouri.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant requested the court to give the following instruction to the jury:

THOS. C. FLETCHER, Executor, *vs.* NEW YORK LIFE INSURANCE CO.

217 The court instructs the jury that it is competent for any party, corporation, or individual employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit the powers of such agent, provided such limitation is brought home to the knowledge of the other contracting party; otherwise, it will be bound by the apparent as well as the actual powers of the agent.

In the case of the policy in suit, both in the application, signed by the insured, a copy of which is attached to the policy, and in the policy itself, it is expressly stipulated that the statements and answers contained in the written application are the basis of the contract, and that no statements, representations, or information made or given by or to the person soliciting the application, or to any other person, should be binding on the company, or in any

manner affect its rights, unless reduced to writing, and presented to the officers of the company at the home office in the city of New York.

The court instructs the jury that this stipulation between the parties, thus limiting the powers of the soliciting agent, and
218 providing that the contract should be based upon the written application, is binding upon the parties; and it is, therefore, immaterial what may have been said by or to the soliciting agent at the time of taking the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant requested the court to give the following instruction to the jury:

THOS. C. FLETCHER *vs.* THE NEW YORK LIFE INSURANCE CO.

The court instructs the jury that it is competent for any party, corporation, or individual, employing an agent in the negotiation of a contract, whether of insurance or otherwise, to limit the powers of such agent, provided such limitation is brought home to the knowledge of the other contracting party; otherwise, it will be bound by the apparent as well as the actual powers of the agent, and, as in this case, the limitation
219 upon the authority of the agent soliciting the policy was in express terms made part of the contract between the parties, it is binding upon the parties.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant then requested the court to give the following instructions to the jury:

THOS. C. FLETCHER, Executor,
vs.
THE NEW YORK LIFE INSURANCE CO.

The court instructs the jury that in the case of the policy in suit, both in the application signed by the insured, a copy of which is attached to the policy, and in the policy itself, it is expressly stipulated that the statements and answers mentioned in the written application are the basis of the contract, and that no statements, representations, or information made or given by or to the person soliciting the application or to any other person should be binding on the company, or in any manner affect its rights, unless reduced to
220 writing and presented to the officers of the company at the home office in the city of New York.

The court instructs the jury that this stipulation between the parties, thus limiting the powers of the soliciting agent and providing that the contract should be based upon the written application, is binding upon the parties, and it is therefore immaterial what may have been said by or to the soliciting agent, at the time of taking

the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant requested the court to give the following instruction to the jury.

THOS. C. FLETCHER, Executor,

vs.

THE NEW YORK LIFE INSURANCE CO.

The court instructs the jury that, whether the statements and answers contained in the application signed by Alford were made by Alford or not, when he thereafter received and accepted the
221 policy with a copy of the original application, with a memorandum plainly endorsed in red ink upon the policy calling his attention to the said copy thus attached, with the request that errors in the application be reported to the company for correction, then it was the duty of Alford to report any such answers incorrectly written down, and thus enable the company to correct any such errors, and by his failure to do so he is presumed to have accepted the said policy upon faith of said answers as written down in the application attached thereto, and to have acquiesced and agreed that the application as thus made should be the basis of the contract of insurance between himself and the company.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant requested the court to give the following instruction to the jury:

THOS. C. FLETCHER, Executor,

vs.

THE NEW YORK LIFE INSURANCE CO.

222 The jury is instructed that although it may appear from the evidence that Alford told the agent that he (Alford) had had diabetes, and referred him to his doctor concerning it, still if Alford died of such disease plaintiff cannot recover, unless it further appears from the evidence that such agent committed a fraud upon Alford by concealing from him what he, the agent, had written in the application—that he, Alford, had not had any disease of the kidneys or any serious diseases, or had never been seriously ill—nor even in such case if afterwards Alford ascertained that such false answer or answers had been written and failed to advise defendant of the true facts.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

Defendant requested the court to give the following instruction to the jury:

THOS. C. FLETCHER, Executor,

vs.

THE NEW YORK LIFE INSURANCE CO.

The court instructs the jury that as it is admitted that

223 Alford, plaintiff's testator, signed the original application, he is presumed in law to have done so knowingly and to have agreed to the terms of the contract therein set forth, and to rebut such presumption it devolves upon the plaintiff to show by the testimony in the case that the soliciting agent committed a fraud upon Alford by writing false answers in the application and inducing Alford to believe that true answers had been written therein.

Which was by the court refused.

To which ruling of the court defendant then and there excepted.

The court thereupon made the following charge to the jury:

GENTLEMEN OF THE JURY:

The principal facts in this case are not disputed. The matters for your consideration will fall within a very narrow compass. It is, therefore, not necessary that the court should charge you at any great length. It is admitted that this policy of insurance was executed by the defendant company; that it was a policy upon the life of Chinonda S. Alford; that Mr. Alford died, having paid his premiums up to the time of his death; that the plaintiff here is
224 his executor and is entitled to recover if a case has been made out upon the contract. The defense is that the application for insurance, Mr. Alford, at the time of making his application, made certain statements in writing in the application which were untrue and which were material. It is said that he represented to the agent of the company that he never had had any serious disease; that he represented that he never had had any disease of the kidneys; that he represented that he never had had any attending physician; that in all these respects his application was untrue, and these being material matters it is claimed that the contract based upon them is void. In answer to this it is said that although there is a writing containing the representations, and although it is signed by the assured, Mr. Alford, yet that writing was obtained from him by fraud on the part of the agent of the Insurance Company. The law is that an insurance company, like any other person, natural or artificial, may appoint an agent and may put limitations
225 upon the powers of the agent, provided knowledge or notice of these limitations be brought home to the party with whom the agent contracts; otherwise, the principal, in this case the Insurance Company, is held to whatever is the apparent scope of the agent's authority. This doctrine is invoked here and is applicable to a certain extent, and only to a certain extent. There is a limitation in this contract upon the power of the insurance agent. The company is not to be bound by any representation made to or by the agent, unless those representations are put in writing and submitted to the company. Therefore, what is contained in this application, although the answers were not truly recorded, would be regarded as constituting the basis of this contract, unless it can be avoided for fraud. Consequently, the question for you to determine is whether there was a fraud in the procuring of this policy of insurance by the agent of the Insurance Company, and upon that subject I will state what I understand to be the correct rule. If the

jury find from the evidence that at the time of making the application Mr. Alford told the agent of the defendant that he,
226 Alford, had had diabetes, and referred him to his physician concerning it, and that such agent committed a fraud upon Mr. Alford by inserting false answers in the application and suppressing the answers actually given, and by concealing from him what he, the agent, had written in the application, thereby inducing him to sign said application without knowing what it contained, then the plaintiff is not estopped to recover.

You will see, gentlemen, that there are two things to be shown, first, that the assured, Mr. Alford, made true representations with regard to this matter of his having had a disease, and his having had an attending physician; secondly, it must appear that the agent of the company, for the purpose of inducing him to insure, for the purpose of obtaining from him the premium which he was to pay, falsely inserted in the application answers which he did not give; and then it must also be shown that Mr. Alford signed the application in ignorance of the fact that his answers had not been truly recorded in it. If all of these appear, then there is a
227 case of fraud established. The burden of proving fraud is upon the plaintiff. The presumption is that the paper which was signed by Alford contained his true answers, and that presumption must be overcome by proof offered on the part of the party asserting that it is not correct; that is, by proof offered here by the plaintiff. I think that is really the only question that there is for your consideration—the question of fraud.

There is another point made by counsel which deserves notice. If the plaintiff ascertained before the contract was consummated that this fraud had been practiced upon him by the agent, it was his duty then to stop, and to go no further; that is, if at any time before the policy was delivered to him and the first premium was paid, he discovered that the agent had committed a fraud upon him and upon the company—because it was a fraud both upon the assured and the company—then it was his duty to stop, and to decline to go any further with the transaction; but, I think, if he did not discover it before the policy was delivered and the first premium
228 paid, that he was not called upon after that to take any steps for the cancellation of the contract.

The defendant has tendered here in open court the sum of $888.26. You will, in any event, return a verdict for that amount. The court will make such order, with regard to costs, as may be considered right after you have returned your verdict, if you give no more than that. The question for you to determine is whether the whole amount of this policy is due, or whether your verdict is to be only for the amount tendered, which is $888.26. If you find for the plaintiff in the whole amount, you will give him interest at the rate of six per cent. per annum from sixty days after the date when the proof was filed, and that date is the 14th of December, 1880, so that interest would begin to run from the 14th of February, 1881. You will have to bear in mind these dates. Your verdict, therefore, will

either be for the sum of $888.26, or for the amount of the policy with interest from February 14th, 1881.

And to said charge of the court defendant excepted at the time.

229 First. To all of said charge.

Second. To all that part contained between words "This doctrine is invoked here, and it is applicable to a certain extent, and only to a certain extent;" "the plaintiff is not estopped to recover;" said part being as follows:

"There is a limitation in this contract upon the power of the insurance agent. The company is not to be bound by any representation made to or by the agent, unless those representations are put in writing and submitted to the company. Therefore, what is contained in this application, although the answers were not truly recorded, would be regarded as constituting the basis of this contract, unless it can be avoided for fraud. Consequently, the question for you to determine is, whether there was a fraud in the procuring of this policy of insurance by the agent of the insurance company; and upon that subject I will state what I understand to be the correct rule. If the jury find from the evidence that at the time of making the application Mr. Alford told the agent of the defendant

230 that he, Alford, had had diabetes, and referred him to his physician concerning it, and that such agent committed a fraud upon Mr. Alford by inserting false answers in the application and suppressing the answers actually given, and by concealing from him what he, the agent, had written in the application, thereby inducing him to sign said application without knowing what it contained, then the plaintiff is not estopped to recover."

Third. To all that part of the charge contained between words "If all of these appear there is a case of fraud established," and words "I think that is really the only question that there is for your consideration, the question of fraud."

Said part being as follows:

"The burden of proving fraud is upon the plaintiff. The presumption is that the paper which was signed by Alford contained his true answers, and that presumption must be overcome by proof offered on the part of the party asserting that it is not correct; that is, by proof offered here by the plaintiff. I think that is really the only question that there is for your consideration, the question of fraud."

231 Fourth. To all that part of charge contained in the following words:

"But I think if he did not discover it before the policy was delivered and the first premium paid, that he was not called upon after that to take any steps for the cancellation of the contract."

Fifth. To all that part of the charge in last paragraph commencing with words, "The defendant has tendered in open court, &c."

The jury, under said instructions of the court, rendered verdict for plaintiff for amount of the policy.

Thereafter, to wit, on the 7th day of October, 1882, defendant filed its motion for new trial and to set aside the verdict, said motion is in words and figures following, to wit:

UNITED STATES OF AMERICA,
Eastern District of Missouri, } *ss:*

In the Circuit Court of the United States for the Eastern District of Missouri.

THOMAS C. FLETCHER, Executor of C. S. Alford, Plaintiff,
vs.
THE NEW YORK LIFE INSURANCE COMPANY, Defendant.

Now comes defendant and moves the court to set aside the
232 verdict herein rendered, and for a new trial, and for reasons therefor states—

First. That the court erred in refusing the instructions to the jury prayed for by defendant.

Second. That the court erred in giving its charge to the jury.

Third. That the court erred in overruling the demurrer to portions of the reply of plaintiff to the amended answer.

Fourth. That the court erred in admitting illegal, incompetent evidence offered on behalf of plaintiff.

Fifth. The court erred in admitting evidence, offered by plaintiff, of statements made to the soliciting agent which were not reduced to writing and forwarded to the home office of the company.

Sixth. The court erred in charging the jury that plaintiff could recover, although he may have discovered the alleged fraud of the soliciting agent after receiving the policy.

Seventh. The court erred in holding that the policy in suit was subject to the provisions of sections 5976 and 5977, of volume 2, Revised Statutes of Missouri.

233 Eighth. The court erred in charging the jury that plaintiff, by reason of alleged fraud of the soliciting agent, was entitled to recover more than the amount of the premiums paid by his testator with interest thereon.

Ninth. That there was no evidence to support the verdict upon the issue submitted by the court.

Tenth. That the verdict was against the law and the evidence.

Eleventh. That the verdict was against the weight of evidence.

Twelfth. That the court erred in excluding competent and legal evidence offered by defendant.

By it attorneys: OVERALL & JUDSON.

Which motion was by the court on said day overruled.

To which ruling of the court defendant then and there excepted.

And thereafter, to wit, on the — day of October, 1882, defendant tendered this its bill of exceptions, which was this 28 day of October signed, sealed, and made part of the record hereof.

GEO. W. McCRARY,
Circuit Judge.

234 And afterwards, to wit, on the 2nd day of November, A. D. 1882, the following further proceedings were had and appear of record, to wit:

Writ of Error Allowed.

THOMAS C. FLETCHER, Executor of Chinonda S. Alford, dec'd, Plaintiff,
vs.
NEW YORK LIFE INSURANCE CO., Defendant. } 1908.

Now comes the defendant, by its attorneys, Messrs. Overall and Judson, and presents to the court a writ of error to remove this cause to the Supreme Court of the United States, and a citation citing and admonishing said plaintiff to be and appear at said Supreme Court of the United States on the second Monday of October next.

Supersedeas Awarded.

And thereupon, the parties hereto consenting, it is ordered by the court that defendant, The New York Life Insurance Company, having deposited in court twenty-two first consolidated guaranteed mortgage bonds of the Albany and Susquehanna Railroad Company, of par value of one thousand dollars each, payable April 1st, 1906, being numbered as follows: 88, 89, 90, 91, 92, 93, 94, 101, 102,
235 105, 114, 124, 125, 126, 127, 128, 129, 151, 152, 153, 154, and 155, with coupons attached, from April 1st, 1884, to maturity, that the said bonds thus deposited be accepted as a supersedeas in lieu of a supersedeas bond in the writ of error issued in said cause from the Supreme Court of the United States, and that the said security is hereby approved and a supersedeas granted therein.

And it is further ordered that the clerk of this court forthwith deposit said bonds in the Safe Deposit Company of St. Louis as a special deposit, subject to the order of this court made in this case, and that the receipt of said Safe Deposit Company therefor be filed with this court. All costs and expenses of said deposit to be paid by said New York Life Insurance Company.

236 UNITED STATES OF AMERICA, } ss:
Eastern District of Missouri, }

I, M. M. Price, clerk of the circuit court of the United States in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true transcript of the pleadings and proceedings in case No. 1908 of Thomas C. Fletcher, executor of Chinonda S. Alford, deceased, plaintiff, against The New York Life Insurance Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof I hereunto subscribe my name and affix the seal of said court, at office in the city of St. Louis, in said district

this 15th day of December, in the year of our Lord eighteen hundred and eighty-two.

[Seal of the United States Circuit Court, Eastern District of Missouri.]

M. M. PRICE,
Clerk of said Court,
By A. P. SELBY, *Deputy.*

237 [Endorsed:] No. 1908, United States circuit court, eastern district of Missouri. Thomas C. Fletcher, executor, against New York Life Insurance Co. Duly certified transcript in the above-entitled cause.

Endorsed on cover: E. Missouri C. C. U. S. No. 184. The New York Life Insurance Company, plaintiff in Error, *vs.* Thomas C. Fletcher, executor of Chinonda S. Alford, deceased. Filed 13th January, 1883.

17519

MAR 11 1886
JAMES H. MCKENNEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
THOMAS C. FLETCHER, EXECUTOR OF CHENONDA S. ALFORD, DECEASED,
Defendant in Error.
} *No. 184.*

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENTS OF ERROR, BRIEF AND ARGUMENT OF PLAINTIFF IN ERROR.

FREDERICK N. JUDSON,
WITH WHOM IS JOHN H. OVERALL,
For Plaintiff in Error.

Nixon-Jones Printing Co., Law Printing, 210 and 212 Pine Street, St. Louis.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1885.

THE NEW YORK LIFE INSURANCE COMPANY,
Plaintiff in Error,
vs.
THOMAS C. FLETCHER, EXECUTOR OF CHENONDA S. ALFORD, DECEASED,
Defendant in Error.

No. 184.

STATEMENT.

This is a suit upon a policy of life insurance issued by the New York Life Insurance Company upon the life of Chinonda S. Alford, insuring his life in his own favor in sum of $10,000. The policy was issued December 22, 1877, and Alford died in city of St. Louis, September 26, 1880. The company declining to pay on account of alleged false statements in the application, disclosed by the proofs of loss, Alford's executor brought this suit upon the policy.

The answer (Rec., pp. 11–14.) of the company alleged that the policy was executed at its home office in the city of New York solely upon the faith of the answers and statements contained in the insured's written application, which were warranted to be true, and to be the only basis of the

contract of insurance, and that it was expressly agreed that no statements or representations made by or to the person soliciting the policy should be binding on the company unless reduced to writing and presented to the officers of the company at the home office with the application, and that a copy of the application was delivered with the policy to the insured.

That it was falsely stated in the application that Alford had never had a disease of the kidneys, or any serious disease, and had never been seriously ill, and had had no usual medical attendant, whereas he had been under medical treatment for diabetes, a serious disease known as disease of the kidneys, and that the policy was void by reason of these false statements.

The answer also alleged that these answers were not only false but material, and that Alford actually died of the same disease, diabetes, which was thus concealed in the application.

The reply of plaintiff (Rec., pp. 14–17), alleged that the soliciting agents of the company were acquainted with Alford and knew his physical condition, and induced him to take out the policy. That he told them of his having been sick and under medical treament, but that the agent inserted false answers in the application; that Alford signed his name twice to the application without reading it over, and without knowledge of the false statements. "That "said agents did not read over to Alford any other parts "of the application, except the questions; did not read "over to him the particular clause set out in defendant's "answer; nor in any manner call his attention to the fact "that his signatures were intended as an acceptance or "assent to said clause."

That when the policy was delivered, Alford read neither the policy nor the copy of application attached, that the agent, who took down the answers assured him (Alford) that his "insurance was safe," and did this with full knowledge of the facts, and that the company was estopped from

pretending that any of the answers as written rendered the policy void.

Plaintiff in error (the company) demurred to these allegations of the reply, as constituting in law no cause of action, nor any reply in law to the facts set forth in the answer (Rec. p. 21), — but this demurrer was overruled by the court (Rec. pp. 21–23).

The policy sued on was read in evidence by plaintiff, (Rec. pp. 26–34) and contained following upon first page thereof: —

THE POLICY.

"The New York Life Insurance Company, by this policy "of insurance, in consideration of the statements and repre- "sentations submitted to its officers, at the home office, in "the city of New York, and contained in the written appli- "cation for this policy, and in the declaration thereto "subjoined (all of which statements and representations "have been and are hereby warranted by the applicant to "be true and are by the parties hereto referred to, and "made part of this contract), upon the faith of which state- "ments and representations this policy is issued, and if the "sum of $263.80 to them in hand paid and of the annual "premium of $263.85, to be paid in like manner, and sums "as per margin in every year during the continuance of "this policy, doth insure the life of Chinonda S. Alford, "merchant of St. Louis, in the amount of $10,000.00 for "the term of his natural life, commencing on the 22d day "of December, 1877, at noon."

* * * * * * * * * * *

"This policy is issued and accepted by the insured upon "the following express conditions and agreements: — "

* * * * * * * * * * *

(1st and 2nd, relating to restrictions upon travel, and to payment of premium). (Rec. p. 28.)

"3d. In every case where this policy shall cease and de- "termine, or become, or be null and void, all payment, "thereon shall be forfeited to this company, and no actions "and no right of action, shall remain to, or be maintained "against this company by the assured, or by any other "person, by virtue of this policy, or of anything connected "therewith.

"4th. Receipts for premiums are not valid unless signed "by the president, vice-president or actuary.

"5th. Agents of the company are not authorized to "make, alter or discharge contracts or waive forfeitures.

"6th. Inasmuch as only the officers at the home office of "the company in the city of New York have authority to "determine whether or not a policy shall issue on any ap- "plication, and as they act on the written statements and "representations herein above referred to, it is expressly "understood and agreed that no statements, representa- "tions, or informations, made or given by or to the per- "son soliciting or taking the application for this policy, or "to any other person, shall be binding on the company, or "in any manner affect its rights, unless such statements, "representations, or information be reduced to writing "and presented to the officers of the company at the home "office in the application referred to."

"7th. * * * (refers only to permission to travel "and to surrender an issuance of paid up policy.")

To the policy on the third page thereof was *attached a copy* of the

ORIGINAL APPLICATION

upon which the policy was issued. (Rec. pp. 29–34).

"Application to the New York Life Insurance Com- "pany: —

"OFFICE, NOS. 346–348 BROADWAY, NEW YORK.

"Particulars required from persons proposing to effect "insurance on lives in this company, and forming the basis "of the contract."

* * * * * * * * * * *

"11. Has the party had or been afflicted since childhood "with any of the following complaints:"

Separate answer required to each query.

* * * * * * * * * * *

Disease of the liver, kidneys, or brain. A. *No.*

* * * * * * * * * * *

"13. Has the party ever been seriously ill? If so, when, "with what complaint, and who was the medical attendant? "(State his name and residence.) A. *No.*"

* * * * * * * * * * *

"27. Name and residence of party's usual medical at-
"tendant? On what occasions, and for what diseases have
"you required his attendance and advice? A. Has *none*.

"(If the applicant has required the services of a physi-
"cian during the last seven years, or for serious illness be-
"fore that period, this certificate must be procured, or the
"issuing of the policy may be delayed.)

"28. Have you consulted any other medical man, if so,
"for what and when? A. *No*.

* * * * * * * * * * *

"35. Is the party aware that any untrue or fraudulent
"answers to the above queries, or any suppression of facts
"in regard to the party's health, will vitiate the policy and
"forfeit all payments made thereon?

"*Yes*.

"I do hereby declare that the person above named whose
"life is proposed for insurance is now in good health, and
"does ordinarily enjoy good health, and that in the above
"proposal I have not withheld any material circumstance or
"information touching the past or present state of health or
"habits of life of the said person with which the trustees of
"the New York Life Insurance Company ought to be made
"acquainted (and that I have an interest in the life of the said
"person to the full amount of the sum hereby applied for).
"And I do hereby agree that the statements and rep-
"resentations contained in the foregoing application and
"declaration shall be the basis of the contract between me
"and the said company; the truthfulness of which state-
"ments and representations I do hereby warrant; and that
"if the same, or any of them, are in any respect untrue,
"the policy which may be issued hereon shall be void, and
"all moneys which may have been paid on account of such
"insurance shall be forfeited to said company; and inas-
"much as only the officers at the home office of the com-
"pany in the city of New York have authority to determine
"whether or not a policy shall issue on any application, and
"as they act on the written statements and representations
"referred to, it is expressly understood and agreed that no
"statements, representations or information made or given
"by or to the person soliciting or taking this application for
"a policy, or to any other person, shall be binding on the
"company, or in any manner affect its rights, unless such
"statements, representations or information be reduced to

"writing and presented to the officers of the company, at the "home office, in the above application. I further
84 "agree that under no circumstances shall the policy "hereby applied for be in force until the actual pay- "ment to and acceptance of the premium by an "authorized agent of the company during the lifetime "and good health of the party whose life is proposed "to be insured; and that the whole or any part of "the risk herein proposed may be reinsured.

"Dated at St. Louis, Mo., this 18th day of December, "1877.

*"Signature of the person or persons for whose ben- "efit the insurance is to be effected. (Write the name "in full.)

"CHINONDA S. ALFORD.

"Witness: LOUIS LEYDBURG.

"AGENT: ANTHONY ROESLEIM.

"Ed. 6–1–77.

"Signature of the person whose life is proposed for "insurance. (Write the name in full.)

"CHINONDA S. ALFORD."

And indorsed on the

BACK OF THE POLICY

is the following, printed in prominent *red type:* —

"For the information of the assured, and in order "that any unintentional errors or omissions, which "hereafter may be found to exist, may be corrected "AN ABSTRACT OF THE APPLICATION, UPON WHICH THIS "POLICY IS BASED, MAY BE FOUND IN THE THIRD PAGE "WITHIN. If corrections are desired, when satisfactory to "the company, a certificate to that effect will be issued "over the signature of the president and actuary."

The evidence established that Alford was a resident of St. Louis, and that he died of diabetes on September 26, 1880. Some six years before his death, and three years before the issuance of the policy, for almost a year he was under medical treatment for diabetes. Dr. Brokaw, who testified to these facts in the proofs of loss presented to

the company, had been his physician for some ten years before his death.

On the day of his application to plaintiff in error, Alford made application to the Penn Mutual Life Ins. Co., of Philadelphia, in which he admitted having had "kidney disease" in 1875, and named Dr. Brokaw as his physician. This company refused to issue a life policy, but granted a fifteen year endowment policy on largely increased premium ($342.20 per annum instead of $134.10). (Rec., pp. 64–72).

From the evidence it also appeared (Rec., p. 54) that diabetes is a serious chronic disease, primarily a disease of nutrition, not necessarily involving the structure of the kidneys in its earlier stages, and commonly and popularly known as a disease of the kidneys, and is a disease of very doubtful curability; persons may apparently fully recover, but are constantly liable to recurrence of same disease.

The Vice-President and Actuary of the company, the officers in charge of the examination of applications and of the issue of policies at the home office in the City of New York, testified (Rec. pp. 40–44), that the policy was issued solely upon the written application, original whereof was filed with their depositions, and a copy attached to the policy and "that no application, statement or representa-
"tion or communication was received from or on behalf of
"the applicant other than the written application."

Under the ruling of the court that the policy was subject to the provisions of secs. 5976, 5977 of vol. 2, Rev. Stat. of Mo., plaintiff in error tendered in court (Rec. p. 52) to plaintiff the sum of $888.26, the amount of net premiums paid by the insured with interest to day of trial, which tender the plaintiff declined to accept in full payment.

The only testimony offered by plaintiff in support of the allegations of his reply was that of Pearman, Alford's clerk, and Warner his partner. (Rec. pp. 80–89.)

Pearman testified, that Alford was sick prior to the application, and he (Pearman) understood that he (Alford) con-

sidered there was something the matter with his kidneys. Was present at the time the application was taken out.

Over the objection of plaintiff in error (exception being duly saved) the witness was permitted to testify to statements by and to the soliciting agent at time of making the application as follows: —

"I could not give the specific words that were used; I "remember in one part of the conversation that Mr. "Alford stood up at the time this question (as to his hav- "ing had kidney disease, etc.), was asked and pointed out "through the window and said 'my medical examiner has "his office across the way, you can go there and find out "from him, I have been affected in the kidneys but he says "I am well and I feel well now.'"

That at one time prior to this, witness heard Alford say to the agent "your company ought not to insure me, you "know that I have been affected with kidney disease." Witness heard Roeslien say on that occasion, he was not positive on what occasion, "just give me your application "and I will see if I can not get it through."

Over the objection of plaintiff in error, witness was permitted to testify (Rec. p. 82), that he didn't think the paper was read over to Alford; he didn't hear it read. He didn't remember what questions were asked; remembered that specific question, on account of Alford's standing up and pointing across the street. He knew that Roeslien, one of the soliciting agents, collected one of the premiums.

On cross-examination this witness (p. 83) said that he didn't recall the other conversation; that question interested him because he didn't suppose Alford would get his policy, as he told Roeslien that he had kidney disease, and he (witness) thought the company *would not want a risk like that*. Witness knew that he had had kidney disease, and everybody that knew him did. Witness also testified (Rec. pp. 85–87) that he expressed his surprise to Alford when he got his policy, but Alford said Roeslien (the agent) knew what he was doing, and would take him even if he had

the disease; that the year after, Alford did not want to pay his premium. He said he didn't know but *the company would contest* the matter (Rec. p. 86). Roeslien had to urge him to pay his first or his second premium, and Alford did not want to do it. He (Alford) was apprehensive of something. Witness reckoned he (Alford) apprehended there would be *some trouble*.

Mr. Warner, Alford's partner (Rec. pp. 87, 88), could not recall any of the conversation, except in a general way, that "Alford never concealed anything in regard to his "having trouble with his kidneys at one time."

There was no testimony tending to show that the application was not read by Alford before signing, or that it was not knowingly signed by him, or that there was any imposition practiced upon him, or that undue influence was exercised over him, or that his treatment for diabetes was disclosed to the local medical examiner. No application was made by Alford to the company at any time for correction of the false answers in the written application.

The court refused to direct a verdict for defendants, and submitted the case to the jury (Rec. pp. 96–98 for charge of Court).

The jury returned verdict for full amount of policy with interest, aggregating $10,988.33, in which sum judgment was entered. Motion for new trial was overruled.

ASSIGNMENTS OF ERROR.

Plaintiff in error assigns as error: —

First. The ruling of the Circuit Court in overruling the demurrer of plaintiff in error to the portions of the reply of defendant in error to the amended answer, setting out the alleged statements and representations to and by the person soliciting the policy. (Rec. pp. 14–18.)

Second. The admission by the Circuit Court against the objection of plaintiff in error of testimony of witness Pearman (Rec. pp. 81–82) and of Warner (p. 88), as to oral statements and representations by and to the persons soliciting the application, which were not reduced to writing and presented to the officers of the company at the home office.

Third. The refusal of the court to instruct the jury at the close of the testimony —

That under the pleadings and testimony plaintiff was not entitled to recover. (Rec. p. 92.)

Fourth. The refusal of the court to give the following instruction to the jury requested by plaintiff in error: —

(Rec. p. 94.) The court instructs the jury that in the case of the policy in suit, both in the application signed by the insured, a copy of which is attached to the policy, and in the policy itself, it is expressly stipulated that the statements and answers mentioned in the written application are the basis of the contract, and that no statements, representations or information, made or given by or to the person soliciting the application, or to any other person, should be binding on the company, or in any manner affect its rights, unless reduced to writing and presented to the of-

ficers of the company at the home office in the city of New York.

The court instructs the jury that this stipulation between the parties, thus limiting the powers of the soliciting agent, and providing that this contract should be based upon the written application, is binding upon the parties, and it is therefore immaterial what may have been said by or to the soliciting agent at the time of taking the application, which was not reduced to writing and presented to the officers of the company at the home office in New York.

5th. The refusal of the court to give the following instruction requested by plaintiff in error. (Rec. p. 95): —

The court instructs the jury that, whether the statements and answers contained in the application signed by Alford were made by him or not, when he thereafter received and accepted the policy with a copy of the original application, with a memorandum plainly indorsed in red ink upon the policy, calling his attention to the said copy thus attached, with the request that errors in the application be reported to the company for correction, then it was the duty of Alford to report any such answers incorrectly written down; and by his failure to do so he is presumed to have accepted the said policy upon faith of said answers, as written down in the application attached thereto, and to have acquiesced and agreed that the application as thus made should be the basis of the contract of insurance between himself and the company.

6th. The refusal of the court to give the following instruction requested by plaintiff in error. (Rec. p. 95): —

The jury is instructed that, although it may appear from the evidence that Alford told the agent that he (Alford) had had diabetes, and referred him to his doctor concerning it, still if Alford died of such disease, plaintiff can not recover, unless it appears from the evidence that such agent committed a fraud upon Alford by concealing from him what he, the agent, had written in the application, that he (Alford) had not had any disease of the kidneys, or any serious disease, or had never been seriously ill, nor even in such case, *if afterwards* Alford ascertained that such false answer or answers had been written, and failed to advise defendant of the true facts.

7th. The following portion of the charge of the court to the jury, duly excepted to by plaintiff in error at the time. (Rec. p. 98):—

There is a limitation in this contract upon the power of the insurance agent. The company is not to be bound by any representations made to or by the agent, unless those representations are put in writing and submitted to the company. Therefore what is contained in the application, although the answers were not duly recorded, would be regarded as constituting the basis of this contract, unless it can be avoided for fraud. Consequently the question for you to determine is whether there was a fraud in the procuring of this policy of insurance by the agent of the insurance company, and upon that subject I will state what I understand to be the correct rule: If the jury find from the evidence that, at the time of making the application, Mr. Alford told the agent of the defendant that he, Alford, had had diabetes, and referred him to his physician concerning it, and that such agent committed a fraud upon Mr. Alford by inserting false answers in the application, and suppressing the answers actually given, and by concealing from him what he, the agent, had written in the application, thereby inducing him to sign said application without knowing what it contained, then the plaintiff is not estopped to recover.

8th. The following portion of the charge of the Court to the jury, duly excepted to by plaintiff in error at the time. (Rec. p. 98):—

The burden of proving fraud is upon the plaintiff. The presumption is that the paper, which was signed by Alford, contained his true answers, and that presumption must be overcome by proof, offered on the part of a party, asserting that it is not correct; that is, the proof offered here by the plaintiff. I think that is the only question that there is for your consideration, the question of fraud.

9th. The following portion of the charge of the Court to the jury, duly excepted to by plaintiff in error at the time. (Rec. p. 97):—

But I think if he (Alford) did not discover it (the alleged fraud) before the policy was delivered, and the first

premium paid, that he was not called upon after that to take any steps for the cancellation of the contract.

10th. The following portion of the charge of the Court to the jury, duly excepted to by plaintiff in error at the time. (Rec. p. 97): —

The defendant has filed here in open court the sum of $888.26. You will in any event return a verdict for that amount. The Court will make such an order with regard to costs, as may be considered right, after you have returned your verdict, if you give no more than that. The question for you to determine is whether the whole amount of this policy is due, or whether your verdict is to be only for amount tendered, which is $888.26. If you find for plaintiff in the whole amount, you will give him interest at the rate of six per cent per annum from sixty days after the date when the proof was filed, and that date is 14th of December, 1880, so that interest would begin to run from 14th of February, 1881. You will have to bear in mind these dates. Your verdict will therefore either be for sum of $888.26, or for the amount of the policy, with interest from Feb. 14, 1881.

BRIEF.

The foregoing assignments of error are involved in and may be considered under the following propositions: —

First. The limitation upon the authority of the soliciting agent having been brought home to the knowledge of the insured by the express terms of the application and policy — such limitation was binding, and the written application was thereby made the sole basis of the contract of insurance, — and oral statements by and to the soliciting agent, and not reduced to writing, were expressly excluded from consideration. The 1st, 2d and 4th assignments of error should, therefore, be sustained.

Globe Ins. Co. *v.* Wolff, 95 U. S. 329;
Ins. Co. *v.* Norton, 76 U. S. 240;
Loehner *v.* Ins. Co., 17 Mo. 250;
Richardson *v.* Marine Ins. Co., 46 Me. 394;
Chase *v.* Hamilton Ins. Co., 20 N. Y. 52;
May on Ins., secs. 137, 140, 141;
Planter's Ins. Co. *v.* Meyers, 55 Miss. 479;
Ryan *v.* World Mut. Life Ins. Co., 41 Conn. 168;
Ins. Co. *v.* Wilkinson, 13 Wallace, 222;
Ins. Co. *v.* Malone, 21 Wallace, 152;
Hoffman *v.* Ins. Co., 92 U. S. 164;
Ins. Co. *v.* McCain, 96 U. S. 86;
Geib *v.* Ins. Co., 1 Dillon, 449;
Baubie *v.* Ætna Ins. Co., 2 Dillon, 158;
Flynn *v.* Equitable Life Ins. Co., 78 N. Y. 568;
Ins. Co. *v.* Davis, 95 U. S. 428;
Shattuck *v.* Mut Life Ins. Co., 4 Cliff. 608;

and as a collorary from the foregoing.

Second. The written application thus being the sole basis of the contract of insurance, the insured can not "avoid" the effect of materially false statements therein contained, and recover on the policy, by proof that such statements were inserted in the application before signature by him, through "fraud" on part of the soliciting agent.

Ryan *v.* World Mut. Life Ins. Co., 41 Conn. 168 (19 Am. Rep. 490);
Loehner *v.* Ins. C., 17 Mo. 250;
Pomeroy *v.* Rocky Mt. Ins. Co. (Sup. Ct. Col.), 14 Ins. L. J. 708.

The 1st, 2d, 3d, 4th, 7th, 9th, and 10th assignments of error should therefore be sustained.

Third. Irrespective of the foregoing, the acceptance and retention by Alford for a period of nearly three years of the policy with copy of the application thereto attached, his attention being specifically called to the importance of correcting errors or omissions thereon, was in law a waiver of an objection to the written application as the basis of the policy; and his representative is bound in an action on the policy by the answers contained in the said application.

The court therefore erred in refusing instruction set forth in 5th and 6th assignments of error, and in charging the jury, as set forth in the 9th assignment of error.

Swain *v.* Watertown Ins. Co., 96 Penn. 43;
Am. Ins. Co. *v.* Neiberger, 74 Mo. 173;
Goddard *v.* Ins. Co., 108 Mass. 57;
Richardson *v.* Marine Ins. Co., 46 Me. 394.

Fourth. Even conceding all of foregoing propositions, and resting the case upon the court's theory of the law, there was no evidence warranting the finding that Alford did not knowingly sign the application. And on this ground alone the court should have directed a verdict for defendant as set forth in 3d assigment of error.

ARGUMENT.

I.

The limitation upon the authority of the soliciting agent having been brought home to the knowledge of the insured by the express terms of the application and policy, such limitation was binding and the written application was thereby made the sole basis of the contract of insurance, and oral statements by and to the soliciting agent, not reduced to writing, expressly excluded from consideration.

The charge of the court practically concedes, what the evidence established beyond controversy, that the written answers, set forth by plaintiff in error, were both false and material, and the case was submitted to the jury upon the single issue of the alleged fraud of the soliciting agent.

The underlying and controlling question presented by the record then is this: —

To what extent can a life insurance company, transacting business in different parts of the country through agents, make contracts at its home office on the faith of the written applications submitted, when it limits the power of its soliciting agents, by bringing in express terms such limitation home to the applicant?

Upon principle, the doctrine is familiar, that it is always competent for a principal to limit the authority of his agent, provided that as to third parties he is bound by the apparent scope of the agent's authority, when the limitations upon such authority are not brought home to the knowledge of the third party. But where such knowledge of the limitations of the agent's authority is communicated, the limitation is binding.

It is needless to cite authorities upon this fundamental proposition, other than to illustrate its recognition and application in case of insurance companies.

In the language of this court, in Globe Ins. Co. *v.* Wolff, 95 U. S. 329: —

"The law of agency is the same, whether it be applied "to the act of an agent undertaking to continue a policy "of insurance, or to do any other act for which his princi- "pal is sought to be held responsible."

And in same case the court pass upon one of the provisions of the policy in suit: —

"The policy declared that he (the agent) was not "authorized to waive forfeitures, and to the provision "effect must be given, except so far as the subsequent acts "of the company permitted it to be disregarded."

And thus holding, the court reversed the judgment of the Circuit Court.

And to the same effect was the language of the court in Insurance Co. *v.* Watson (96 U. S. 240): —

"It (the policy) also contained an express declaration, "that the agents of the company were not authorized to "make, alter, or abrogate contracts, or waive forfeitures, "and these terms, had the company so chosen, it could "have insisted on."

We quote the language of the Supreme Court of Missouri in a very analogous fire insurance case (Loehner *v.* Home Mutual Ins. Co., 17 Mo. 256): —

"The plaintiffs were not at liberty to obviate this objec- "tion by claiming that the agent of the company had "knowledge of the existence of an incumbrance at the "time of the application, but that he refused to write down "the answer, saying the incumbrance was too trifling. "Independently of the statute (the charter) which required "the incumbrance to be expressed in the policy at the "peril of its being void, there was a memorandum indorsed "on it, which made known that the company would be "bound by no statement made to the agent, not contained

"in the application. The facts being as represented, they "could not give the plaintiff the right of a lien on the pol- "icy, in the teeth of the statute (charter) and against the "terms of the contract."

And the court goes on to say that plaintiff's only remedy, if facts alleged were true, was the recovery of the premiums paid.

Richardson *v.* Marine Ins. Co., 46 Me. 394;
Chase *v.* Hamilton Ins. Co., 20 N. Y. 52;
May on Ins., secs. 137, 140, 141.

It is true there are cases of fire insurance where the local agent makes the contract, which hold that a provision in a policy that the person taking the application shall be deemed for all purposes the *agent of the insured, and not of the insurer*, involves a legal contradiction, and is void, but in these same cases is recognized the principle here contended for, that the company can limit by express notice to the insured the powers of its agents. The distinction is aptly illustrated by the Supreme Court of Mississippi in Planters' Ins. Co. *v.* Meyers, 55 Miss. 479, where the court, after holding such a provision invalid, says: —

"We do not say that the company could not restrict the "apparent and ostensible authority of its agents. It might be "altogether fair and reasonable to write or print in the appli- "cation with which the agents were supplied a notice that the "company, in taking risks, would be governed exclusively "by the surveys and answers to the written interrogatories, "and *not by any verbal answer given to the agent, or infor- "mation imparted to him, and not written in the applica- "tion*. That would give notice to customers that the "consequence of erroneous answers or concealments, "material to the risk, not disclosed in the written applica- "tion, rested on them, and on *them alone*. * * * "Whilst we can not sustain this condition (*i. e.*, that of "policy in suit, that agent was agent of insured) we repeat "that it is entirely legitimate for this corporation to limit "the powers of its local agents, but if they choose to do

"so those with whom they do business ought to be informed "of it."

And in same opinion the court pronounces reasonable a stipulation "that the company would not be bound by any "act done or statements made by or to any agent or other "person not contained in the application."

In a case very analogous to the one at bar (Ryan *v.* World Mut. Life Ins. Co., 41 Conn. 168, 17 Am. Rep. 494), the Supreme Court of Connecticut note the same distinction, saying: —

"Some of the cases cited by plaintiff are cases of fire "insurance, in which the agents were intrusted with blank "policies, and had full power to fill up and issue the same, "without referring the application to the home office. In "such cases the company contracts solely by its agent; "the acts and knowledge of the agent are the acts and "knowledge of the corporation, and there is a manifest "propriety in holding the corporation accordingly."

The opinions of this court in the Wilkinson case (13 Wallace, 222), and in the Mahone case (21 Wallace, 152), give no support to the ruling of the court below. In neither of these cases was the question involved in the case at bar presented. In neither does it appear that any limitation upon the power of the agent was brought *to the notice* of the insured, and accordingly the companies were held bound by the *apparent scope* of their agent's powers. Thus in the Wilkinson case the principle here contended for was expressly recognized — the court saying: —

"The powers of the agent are *prima facie* co-extensive "with the business intrusted to his care, and will not be "narrowed by limitations *not communicated* to the person "with whom he deals."

In other words, in these cases the insured (to quote the language of the Wilkinson case), had the right to look to the agent "as the *full and complete representative* of the

"company in all that is said or done in making the con-"tract."

It is to prevent the possibility of the insured being thus misled, and to prevent the possibility of the injustice sought to be perpetrated in the cases referred to, that the plaintiff in error has in every way, in the most explicit terms, brought to the notice of its applicants the restrictions upon the authority of its soliciting agents. The notice is set forth in the application, which the insured signs — and is repeated in the policy, which he receives. To prevent the possibility of mistake or deception, a copy of the application is attached to the policy, and the necessity of correcting mistakes brought to the attention of the insured in the most prominent manner. Could anything more be suggested to be done?

We know of no authority, denying the validity of such restrictions, when brought to the knowledge of the insured, and the cases in which the companies have been held bound by acts within the apparent scope of the agent's powers, rest upon the ground that the limitations upon the agent's authority had not been brought home to the insured.

Hoffman *v.* Ins. Co., 92 U. S. 164;
Ins. Co. *v.* McCain, 96 U. S. 86;
Geib *v.* Ins. Co., 1 Dillon, 449;
Baubie *v.* Ætna Ins. Co., 2 Dillon, 158;
Flynn *v.* Equitable Ins. Co., 78 N. Y. 568.

As reference is made in the record to certain sections of the statutes of Missouri, it is proper to add that there is nothing in those sections (even if this policy is held subject thereto) which in any way effects the right of the company to limit the authority of its soliciting agents. The sections referred to are as follows (Vol. 2, Rev. Stats., p. 1169):

Sec. 5976. *Misrepresentation.* No misrepresentation made in obtaining or sealing a policy of insurance on the

life or lives of any person or persons shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event, on which the policy is to become due and payable, and whether it is contributed in any case, shall be a question for the jury.

Sec. 5977. *Defense in case of Suits.* In suits brought upon life insurance policies, heretofore or hereafter issued, no defense based upon misrepresentation shall be valid, unless the defendant deposit in court for the benefit of its plaintiff, the premiums executed on such policies.

The Missouri law does not make the acceptance of these provisions a condition for the admission by foreign life insurance companies to do business in the State. The policy in suit is not countersigned at the local office, and the contract of insurance is clearly made at the domicil of the company. As in Ins. Co. *v.* Davis, 95 U. S. 428, "the "circumstances show nothing but the common case of the "establishment of an agent for mutual convenience of the "parties, and do not present the slightest grounds for "varying the legal effect of their written contract."

Shattuck *v.* Mut. Life Ins. Co., 4 Cliff. 608.

But the ruling of the circuit court upon this question of the *situs* of the contract was rendered immaterial by the admitted fact that the misrepresentation (or breach of warranty) *did* contribute to the contingency on which the policy was payable (and the court so charged the jury) and by the refusal of plaintiff to accept the premiums tendered. The ruling, thus being rendered immaterial, is not assignable for error; and is noted merely to show that there is nothing in the statute, however construed, affecting the right of the company to restrict, by agreement with the insured, the power of its soliciting agents.

The testimony of statements to and by the soliciting agent, not reduced to writing, was therefore inadmissible

under the express agreement of the parties, and the 2nd and 4th assignments of error should be sustained.

As a corollary from the foregoing, it follows, that —

II.

The written application thus being the sole basis of the contract of insurance, the insured can not "avoid" the effect of materially false statements therein contained, and recover on the policy, by proof that such statements were inserted in the application before signature by him, through "fraud" on part of the soliciting agent.

The substance of the charge of the court to the jury (see Rec., pp. 96–98 for charge in full), is set forth in 7th, 8th, 9th and 10th assignments of error (*supra*, pp. 12, 13). It instructs the jury that there is but one issue in the case, that of the alleged "fraud" of the soliciting agent.

The court below admitted the validity of the limitations upon the agent's authority, but said it "was only applicable "to a certain extent." To quote from the charge to the jury. (7th assignment of error *supra*.)

"There is a limitation upon the power of the insurance "agent. The company is not to be bound by any repre- "sentation made to or by the agent, unless those represen- "tations are put in writing, and submitted to the company. "Therefore, what is contained in this application, although "the answers are not truly recorded, would be regarded as "constituting the basis of the contract *unless it (the appli- "cation) can be avoided for fraud.*"

It will be conceded that fraud renders voidable any transaction or contract into which it enters, as a material constituent element, and entitles the injured party to a restoration of what he has lost by reason of the fraud upon him, *i.e.*, to be placed in *statu quo*, as far as practicable. But that is not the position of the insured in this case. He is not

seeking to *annul* the contract of insurance, because the application, its sole basis, was induced by fraud; and to be placed in *statu quo* by restoration of the premiums paid. He *declines* the premiums when proffered, and demands the *enforcement* of the *contract* of insurance, although insisting with same breath, that its sole basis, the written application, is not binding upon him. The singular anomaly is presented, that the alleged fraud of the soliciting agent, which the court says (Rec. p. 97) is a "fraud upon both "*the assured and the company*," becomes the sole ground of recovery.

The written application with the policy issued thereon constitute the *contract* of insurance, and the assured accepts the policy with the *application attached as constituting the contract.* If the application is "avoided for fraud," what constitutes the contract? Clearly the *parol* application to the *agent* not disclosed to the company. The Circuit Court concedes that the limitation upon the authority of the agent was valid. (Rec. p. 96.) "An insurance "company, like any other person, natural or artificial, may "appoint an agent, and may put limitations upon the "powers of the agent, provided knowledge or notice of "these limitations be brought home to the party, with "whom the agent contracts." Yet the *effect* of its ruling is that a soliciting agent with expressly limited powers, can make a *contract* of insurance of an uninsurable risk upon a parol application, and bind the trust funds of his principal for its enforcement.

The jury is instructed that unless the agent committed the alleged fraud, plaintiff can not recover, but if he did commit the fraud, plaintiff can recover; or rather (10th assignment of error, *supra*) if there was *no* "fraud," and the written application is binding, then plaintiff can recover the premiums; but if there was "fraud," and the written application is thereby "avoided," plaintiff can recover the amount of the policy. Thus the assured estate becomes enriched by ten thousand dollars from the trust funds of this mutual insurance company, solely because an agent

was false to his trust, and committed fraud upon "both the deceased and the company."

But upon this issue of "fraud," the remarks of the Supreme Court of Connecticut, in the very analogous case of Ryan *v.* World Mut. Life Ins. Co., 41 Conn. 168 (19 Am. Rep. 490) are very apposite, although the limitations upon the agent's powers were far less stringent than in case at bar.

"The principal reason urged for holding the defendants "liable in this case is the one suggested in the argument, "that when one of two innocent persons must suffer by "the fraud, negligence or unauthorized act of a third, he "who clothed the third with the power to deceive or injure "must be the one.

"Our answer is, in the first place, that this is not ex- "actly a case in which one of two innocent persons must "neccesarily suffer. There is no absolute loss for us to "determine on whom it shall fall. If the plaintiff fails to "recover she sustains no pecuniary loss, except the pre- "mium paid, nor that even if she is innocent and the law "is so that she can recover it back on the ground that "there was a failure of consideration. It is unlike a case "of fire insurance. Nearly all the property may be in- "sured at some rate, if not in one office in another. But "in this case the plaintiff's husband was not an insurable "subject. His situation was such that one company had "rejected him, and but for the aid of fraud neither this nor "any other company would have accepted him. Had the "truth been stated, *no policy would have issued*, and as she "would have had no better success probably with other "companies, we can not see that she has been misled to "her prejudice except in relation to the premium, which "is comparatively a small matter.

"In the second place, if the rule is to be applied to this "case, it is by no means certain that it will aid the plain- "tiff. *The fraud could not be perpetrated by the agent* "*alone*. The aid of the plaintiff or the insured, either as "an accomplice, or as an instrument, was essential. If she "was an accomplice, then she participated in the fraud, "and the case falls within the principle of Lewis *v.* The "Phœnix Mutual Life Ins. Co., 39 Conn. 100. If she was "an instrument, she was so because of her own negligence, "and that is equally a bar to her right to recover. She

"says that she and her husband signed the application "without reading it and without its being read to them. "That of itself was inexcusable negligence. The applica- "tion contained her agreements and representations in an "important contract. When she signed it she was bound "to know what she signed. The law requires that the in- "sured shall not only in good faith answer all the inter- "rogatories correctly, but shall use reasonable diligence to "see that the answers are correctly written. It is for his "interest to do so, and the insurer has a right to presume "that he will do it. He has it in his power to prevent "this species of fraud and the insurer has not."

And the Supreme Court of Missouri in an analogous case already cited (Loehner *v.* Ins. Co., 17 Mo. 256): —

"If the conduct of the agent was such, as is alleged, "he was guilty of a gross fraud, as is shown by his setting "up this defense, which would *avoid* this policy, and *give* "*a right of action for the premium*, but could not for the "reasons stated, entitle the plaintiff to an action on the "policy."

See, also, Pomeroy *v.* Rocky Mt. Ins. Co. (Supreme Court of Colorado), 14 Ins. Law J., p. 703.

The position of defendant in error is as untenable, as it is anomalous. It has no support in the class of cases already referred to, where the absence of notice of limitations of the agent's authority, held the conpamies bound by the apparent scope of their authority. In such cases (as in the Wilkinson (13 Wallace) and Mahone (21 Wallace) cases, (already cited), the company is held to be equitably estopped by the fraudulent act of the agent, because, as said in the Wilkinson case, the insured had the right to look to the agent "as the *full and complete representative* of the com- "pany in all that is said or done in making the contract." Again in the Mahone case, the court says: "The acts and "declarations of Yeiser (the agent) are to be considered the "*acts and declaration of the company*, whose agent he was, "and Dillard (the insured) was *justified* in so understand- "ing them." In other words the basis of recovery in such cases is not the fraud in itself, but the doctrine of equit-

able *estoppel* whereby the company is held bound by even fraudulent acts of its agents within the apparent scope of their authority, whereon the insured had the right to rely.

But in the case at bar there is no possible basis for the operation of an *estoppel*. The express agreement of the parties as to the agent's authority precludes it. The specific notice is given, and the unusual precautions taken by plaintiff in error, in order to protect both the insured and the company against the possibility of just such frauds, as here alleged.

The copy of the application having been attached to the policy, when delivered to the insured, the alleged fraud could not possibly have been committed, without the insured's actual connivance or hardly less culpable negligence.

It is obvious, that to sustain the position of the Circuit Court, involves the assertion that it is impossible for an insurance company to impose *any* restriction upon the authority of its agents, however clearly brought home to the insured, which may not be swept away by applying the epithet of fraud.

The 1st, 2d, 3d, 4th, 7th, 9th and 10th assignments of error should therefore be sustained.

III.

Irrespective of the foregoing considerations the acceptance and retention by Alford for a period of nearly three years, of the policy with copy of the application thereto attached, his attention being specifically called to the importance of correcting errors or omissions therein, was in law a waiver of any objection to the written application as the basis of the contract, and his representative is bound in an action on the policy by the answers as written in said application.

The court refused to charge the jury to this effect as requested by plaintiff in error (5th assignment of error),

and gave the following charge (8th assignment of error): —

"There is another point made by counsel which deserves "notice. If the plaintiff ascertained *before* the contract "was *consummated* that this fraud had been practiced "upon him by the agent, it was his duty then to stop and "go no further, that is, if at any time *before* the policy "was *delivered* to him and the *first premium was paid*, "he discovered that the agent had committed a fraud upon "him and upon the company — because it was a *fraud* "*both upon him and the company* — then it was his duty "to stop, and to decline to go any further with the trans-"action; but, I think, if he did not discover it *before* "the *policy was delivered* and the first premium paid, "that he was not called upon after that to take any steps "for the cancellation of the contract."

We submit that irrespective of the other questions involved, this charge was palpably erroneous. Assuming that fraud was perpetrated by the solicitor, it would be instantly disclosed by an inspection of the application, a copy of which was attached to the policy when delivered. Under the ruling of the court if Alford paid the first premium on or before the delivery of the policy, and discovered *immediately thereafter* on examining the policy and copy of application attached, that a fraud both upon the company and himself had been committed by the insertion of false answers in the application, he still could hold the policy for three years until his death, without disclosing the fraud, the company being ignorant of the fraud, and then his representative can enforce the *policy*, while repudiating the *application* as obtained by fraud.

The statement of this position is its refutation. It is equally unsound in law and morals. The retention of the policy under the circumstances stated was an *acceptance* of the written application attached thereto as its basis, and the representative after three years will not be heard to say that the application was fraudulent. He is clearly estopped.

The principle here relied on has been applied in analogous cases, but is too clear to require citation.

Thus in a recent case in the Supreme Court of Pennsylvania (Swain *v.* Watertown Ins. Co., 96 Pa. 43) where application was *changed* by the agent *after* signature by applicant, it was held that though assured was not bound by the warranties in the application by reason of the fraud upon him, yet that the fraud did not effect the terms of the policy independent of the application.

"When he accepted the policy he accepted its terms. " * * * To say that he did not read the policy, and " did not know its terms, sounds as ill in him, as in the " company to say that it did not know that Smullen was " its agent. Warren held the policy more than two months " before the fire. * * * After the lapse of a reason- " able time, without objection, he is presumed to have " acquiesced."

In a suit by a fire insurance company upon a premium note, where it was claimed that defendant was released because the policy did not contain certain stipulations, which the agent represented that it would contain, the Supreme Court of Missouri (American Ins. Co. *v.* Neiberger, 74 Mo. 173) say: —

"But in such case, it will the duty of the insured, when " he receives the policy, promptly to examine the same, " and if it does not contain the stipulations agreed upon " to at once notify the company of such fact, and of his " refusal to accept said policy. The policy in this case " was issued on the 25th day of January, 1875, and was " not rejected by the defendant until May 10, 1875. If " the policy was received by the defendant soon after the " date on which it purports to have been issued, we think " he waited too long to elect whether he would receive the " policy without the stipulation in regard to cancellation, " or refuse to accept it, because it did not contain such " stipulation. After such delay he will be deemed to have " *accepted the policy as issued.*"

Goddard *v.* Ins. Co., 108 Mass. 57;
Richardson *v.* Maine Ins. Co., 46 Maine, 394.

While it is clear that Alford (if not grossly and culpably negligent) must have discovered the alleged fraud as soon as he received the policy; it is equally clear that if not an actual accomplice in the fraud, he would not have discovered it until then; as he had of course no opportunity to examine the application, until the copy of it was returned to him attached to the policy. The charge of the court (8th assignment of error), that it was Alford's "duty to stop and go "no further," on discovery of the fraud, provided he discovered it *before* the "contract was consummated," *i. e.*, "before the policy was delivered to him and the first pre- "mium paid," was therefore tantamount to this — as long as it wasn't possible for Alford to discover the fraud, it was his "duty" to stop and go no further, if he did discover it, but as soon as he could, and of necessity must discover the fraud, *then* if he discovered it, he was relieved of all obligation "to stop," and could enforce the policy, *notwithstanding his knowledge of the fraud.*

There was palpable error therefore in refusing the instruction plaintiff of in error set forth in fifth assignment of error (as also in sixth assignment of error), and in the charge of the court set forth in ninth assignment of error.

IV.

Waiving all the foregoing propositions and resting the case upon the Circuit Court's theory of the law, there was no evidence warranting the finding, that Alford did not knowingly sign the application.

Examination of the record discloses that even if the Circuit Court was correct in its construction of the contract rights of the parties, and that the issue of "fraud," as set forth, could be raised in the case, still there was no evidence on which such issue could be submitted to the jury.

Under the charge of the Court, to sustain a recovery, it was necessary for the jury to find, not only that the agent "falsely inserted in the application answers which Alford "did not give, but also that Alford signed the application "*in ignorance* of the fact, that his answers had not been "truly recorded in it."

Alford admittedly signed his name twice (signing both as the *insured* and the *assured*) to the application and appended declaration. He was in full possession of his mental faculties. There is no evidence of his signature having been secured by any deceit or imposition — no evidence of any misunderstanding on his part, or any undue influence over him; nothing but exceedingly loose testimony of statements made by him to the soliciting agent.

The witness Pearman admitted (Rec. p. 84) that he didn't see Alford sign the paper and could recall none of the conversation (Rec. p. 81) except as to the one question; only testified that he didn't hear the questions and answers read over *to* Alford. This was all the testimony upon the signing of the paper.

Fraud must be proved, not conjectured. It is obvious, that the fact that the answers were not read *to* Alford, affords no presumption that he did not *knowingly* sign the paper, or even that he did not read it before signing.

The emphatic language of this court is applicable: —

"It will not do for a man to enter into a contract, and "when called on to respond to its obligations, to say that he "did not read it when he signed, or did not know what it "contained. If this were permitted contracts would not "be worth the paper on which they are written. But such "is not the law. A contractor must stand by the words of "his contract, and if he will not read what he signs, he "alone is responsible for the omission."

Upton *v.* Triblicock, 91 U. S., p. 50.

But so far is the testimony from supporting the theory of a fraud *upon* Alford, that it indicates clearly that if not

the accomplice, he was the culpable instrument through whom the fraud upon the company was affected. He knew that he was not an insurable risk, and that he ought not to be insured by the company (Rec. p. 82), relied on the agent "to get it through" (Rec. p. 82), and after he received the policy was "apprehensive of trouble," and objected to paying the premiums, "didn't know but what the company would *contest the matter*" (Rec. p. 86). As in the Ryan case (41 Com. 168), *supra*: "If this falls "short of proving actual collusion, it shows clearly that "he comprehended the importance of the answers and exhib- "its his negligence in a stronger light."

A verdict for defendant should therefore have been directed on this ground alone, irrespective of the other questions involved, and the 3rd, 7th, 8th and 10th assignments of error should be sustained.

FREDERICK N. JUDSON,
WITH WHOM IS JOHN H. OVERALL.
For Plaintiff in Error.